NO. 20129 and 20130

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

In the matter of the Petition of AMERICAN MAIL LINE LTD., a corporation, owner pro hac vice of the American Oil Screw ISLAND MAIL, Official No. 241157, for exoneration of liability, et al.

UNITED PACIFIC INSURANCE COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

I.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

On May 29, 1961, at about 1542 hours PDST, while en route from Seattle to Bellingham, Washington, the 474-foot American flag cargo vessel M/V ISLAND MAIL struck an uncharted rock, at approximately 48° 19.35′ north latitude, 122° 53.3′ west longitude, sustaining severe damage to her hull and

substantial damage to her cargo (Findings of Fact Cause No. 16875, #1, 2, 15, 22, R. 146, 149, 153) [hereinafter cited as FF].

The casualty spawned much litigation.

The Petition of the vessel's charterer, American Mail Line, Ltd. for Exoneration from or Limitation of Liability, and five other cases, were consolidated for trial (Docket entry of September 23, 1962, Clerk's Record 5) [hereinafter cited as CR] and tried in the United States District Court for the Western District of Washington, commencing October 13, 1964. Of these six actions three are now on appeal to this Court, having been brought here on a unified record and consolidated for purposes of briefs and argument by stipulation of the parties and order of this Court entered September 20, 1965.

The three cases on appeal arose as follows:

1. *Appellate Cause No.* 20129, *In Re American Mail Line, Ltd.* This action was commenced by the filing of a Petition for Exoneration from or Limitation of Liability by American Mail Line, Ltd. (hereinafter "Mail Line"), the demise charterer of the ISLAND MAIL and was numbered Admiralty No. 16733 in the District Court. Claimants, Insurance Company of North America, et al (insurers and/or owners, shippers or consignees of cargo aboard the ISLAND MAIL) filed their answer to the said petition and their claims (CR 206, 198), seeking recovery for loss and damage to their cargo.[1]

1. Motions were later made to amend both the Answer and Claims (CR 226; 210), but hearing and decision on the Motions was reserved, the matter having been set for trial on the issues of jurisdiction and liability only (Docket entry of September 23, 1962, CR 5; Pre-Trial Order, Par. 2, CR 82) [hereinafter cited as PTO].

The District Court had jurisdiction of the proceeding under Title 28, U.S.C. § 1333, R.S. 4285, as amended, Title 46, U.S.C. § 185, and Supreme Court Admiralty Rules 51-54, inclusive.

After entry of Findings of Fact and Conclusions of Law (CR 228) and Decree (CR 240) on December 18, 1964, dismissing the cargo claims with prejudice, Appellants (who are identified in the Record at CR 244) timely filed their Notice of Appeal on March 16, 1965 (CR 243). This Court has jurisdiction of the appeal under the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C. § 1292 (3), and Supreme Court Admiralty Rule 55.

2. *Appellate Cause No.* 20130, *United Pacific Insurance Company, et al v. United States of America.* This action was commenced by the filing of a libel on May 14, 1963 by United Pacific Insurance Company and other insurers, owners, shippers or consignees of cargo aboard the ISLAND MAIL (the parties appealing are listed at CR 181), seeking recovery from the United States for loss and damage to private cargo, including reimbursement for the amounts of their respective contributions in General Average, as might ultimately be determined. The case was docketed as No. 16875 in the United States District Court for the Western District of Washington and consolidated with the Limitation action. The District Court had jurisdiction of the libel under Section 2 of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 STAT. 525, as amended, Title 46, U.S.C. § 742.

After entry of Findings of Fact and Conclusions of Law (CR 145) and Decree (CR 162) dismissing the libel with prejudice, on December 18, 1964, appellants timely filed their Notice of Appeal on

March 16, 1965 (CR 180). This Court has jurisdiction of appeal under Title 28, U.S.C. § 1291.

3. *Appellate Cause No.* 20266. *United States of America v. Dewey Soriano.* This action was commenced by the filing of a libel by the United States of America to recover from the pilot of the ISLAND MAIL, Dewey Soriano, the damage sustained by it as a result of the casualty (CR 259). The case was docketed as No. 16853 in the United States District Court for the Western District of Washington. The District Court had jurisdiction of the cause under Title 28, U.S.C. § 1333 (1).

After entry of Findings of Fact and Conclusions of Law (CR 268) and Decree on December 18, 1964 (CR 298) dismissing the libel with prejudice, appellant United States timely filed its Notice of Appeal on March 16, 1965 (CR 300). This Court had jurisdiction of that appeal under Title 28, U.S.C. § 1291.

The parties to the appeals so consolidated are as follows:

(a) Appellants Insurance Company of North America, et al, in Cause No. 20129 and appellants United Pacific Insurance Company, et al, in Cause No. 20130, are jointly represented and this opening brief is submitted on behalf of both sets of appellants, hereinafter sometimes called "Private Cargo."

(b) The United States of America, as appellee in Cause No. 20130 and as appellant in Cause No. 20266.

(c) American Mail Line, Ltd. as appellee in Cause No. 20120.

(d) Dewey Soriano as appellee in Cause No. 20266.

II.

STATEMENT OF THE CASE

A. Summary of the District Court's Findings and Conclusions.

Before setting out what must necessarily be a lengthy factual statement, it may be helpful to summarize the trial court's disposition of the ultimate issues in each of the three cases.

1. In Private Cargo's suit against the United States, the District Court found that the Government was "negligent, perhaps grossly so," (Oral Opinion, Tr. 1142, incorporated in Finding of Fact 43, CR 160) in failing to correct erroneous information it had previously published to mariners and placed upon the several charts of the casualty area published by the Government, but that such negligence was not a proximate cause of the ISLAND MAIL casualty which, for purposes of this case, it found was caused solely by the failure of the pilot Soriano to check the position of the vessel and make an allowance for set of the current, thereby permitting the vessel to penetrate the "10-fathom curve," which it found to be a warning of danger in that area (FF 39, 40; CR 159).

2. In the case of the *United States v. Soriano,* the District Court found that the Government had failed to sustain its burden of proving the pilot negligent (Conclusion of Law 3; CR 279). It found that the Government had failed to prove, as against the pilot, that the ISLAND MAIL had penetrated the 10-fathom curve or that it had struck the rock which all parties to the proceedings below and to

these appeals, except Soriano, stipulated that it had struck.

3. In dismissing the claims of Private Cargo against the charterer in the limitation action, the District Court found the ISLAND MAIL seaworthy and that Mail Line had used due diligence to make her so, although it was undisputed that Mail Line knew that the vessel's fathometer or echo sounding machine was inoperable at the commencement of the voyage (PTO, CR 15; FF 8, CR 231). As in the Private Cargo-Government case(but not in the Government-Pilot case), the District Court concluded that the casualty was caused by the act, neglect and default of Pilot Soriano in the navigation of the vessel (Conclusion 5, CR 237-8).

The "bare bones" of Private Cargo's appeal in No. 20130 is that the District Court erred in finding and concluding that the negligence of the United States was not a proximate cause of the ISLAND MAIL casualty.

The "bare bones" of Private Cargo's appeal in No. 20129 is that the District Court erred in finding and concluding that the ISLAND MAIL was seaworthy, despite her inoperable fathometer, in the light of its concurrent finding in No. 20130 that the proximate cause of the casualty was negligent penetration of the 10-fathom curve, a fact immediately ascertainable from a functioning fathometer had the ISLAND MAIL been so equipped.

B. Facts Pertinent to Private Cargo's Appeal Against the Government

The principal issue on the appeal in the case of United Pacific Insurance Company, et al, against the United States is a mixed issue of law and fact.

Private Cargo, the United States, and American Mail Line were all agreed that the ISLAND MAIL struck a rock at approximately 48° 19.35′ N. Latitude, 122° 53.3′ West Longitude (See their respective contentions in the Pre-Trial Order at CR 36 [Par. 1], CR 43 [Par. 2], and CR 74 [Par. 31]). The District Court so found in the Private Cargo-Government (FF 15, CR 149) and Private Cargo-Mail Line (FF 10, CR 232) cases. The District Court described this as the 3.5 rock (FF 43, Oral Opinion, Tr. 1130).[2] At the time of the ISLAND MAIL casualty, the rock was not shown on Government-published charts (FF 15, CR 149).

It was and is the contention of Private Cargo that, in striking the 3.5 rock on May 29, 1961, the ISLAND MAIL pushed the rock over, from west to east, and that on June 18, 1952, the vessel CHARLES CROCKER had struck the same rock, in the position in which it existed prior to contact by the ISLAND MAIL. The heart of Private Cargo's case is that the Government was negligent in disseminating erroneous information to mariners, in failing to correct such erroneous information, in publishing inaccurate charts, and in failing to disseminate information it received concerning the CROCKER casulty, and that such negligence of the Government was a proximate cause of the ISLAND MAIL casualty. The District Court found the Government "negligent, perhaps grossly so" in these respects (FF 43, Oral Opinion, Tr. 1142; FF 41, CR 158-9)

2. This rock was determined by Navy divers to have a least depth of 22 feet below the surface of the water at mean lower low water, in the position in which it was found on July 13, 1961. (PTO Par. 10, CR 19-20). The designation "3.5 rock" was used, and will be used herein, for convenient reference. 3.5 fathoms = 21 feet.

but it further found that the CROCKER had struck a different rock (FF 43, Oral Opinion, Tr. 1143-5; FF 38, CR 158), and that the negligence of the Government in its handling of information concerning the CROCKER casualty was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145; FF 39, CR 158).

In describing Private Cargo's contentions, the District Court termed them "the most probable possibility" and "convincing." (FF 43, Oral Opinion, Tr. 1138, 1143). Nevertheless, the Court rejected the contention as "speculation and not supported by the evidence" (FF 43, Oral Opinion, Tr. 1143). In so ruling, the District Court failed to give to circumstantial evidence that consideration which this and other courts have said it must receive in cases like this.

Because it rejected appellants' factual theory (which was not only "the most probable possibility" and "convincing," but had the added virtue of being the only theory that could satisfactorily explain the two casualties that will be discussed below) the District Court found no causal relationship between the respondent's negligence ("the Government was negligent, perhaps grossly so,") and the casualty.

The material evidence pertinent to the appeal of Private Cargo against the Government was as follows:

1. The ISLAND MAIL Casualty:

The motor vessel ISLAND MAIL while proceeding from Seattle to Bellingham on May 29, 1961, attempted to pass west of Smith Island in the Straits of Juan de Fuca. Passage to the east of Smith Island was preferable, but these waters were

denied to the use of the vessel by reason of their use by the Government as a naval exercise area (PTO Par. 18, CR 17).

Departure from Seattle was taken at 1139 hours PDST, at low water. From then until the casualty, the tide was flooding, the weather clear and sunny, seas calm, visibility good and wind slight (FF 5, 6, CR 146, 147).

At all material times, the vessel was being conned by Dewey Soriano, a licensed State pilot, whose employment was compulsory under State law (FF 3, CR 146). Its Master was Captain H. D. Smith. The Mate on watch at the time of the casualty was 3rd Mate H. G. Gunderson (FF 2, CR 146).

The ISLAND MAIL was partially loaded, with drafts as follows: forward 24′ 0″; aft 29′ 2″; mean 26′ 7″. It was down by the stern a distance of .01139 feet per foot of registered length (FF 7, CR 147).

At 1542 hours, the approximate time of the casualty, the tide was 5.4 feet above mean lower low water in the area of the casualty (FF 5, CR 147).[3]

At 1542 hours, while rounding Smith Island, the ISLAND MAIL hit an uncharted obstruction, tearing a long gash in her hull, and necessitating that it be intentionally beached at Ship Harbor, Anacortes, Washington (FF 15, 22, CR 149, 153). A number of her crew members reported experiencing at the time of the impact a heavy list to the port, a slowing down of the vessel and then a roll back to the starboard (for example, see Coast Guard Tran-

3. The depth datum appearing on all U.S. charts set forth soundings at mean lower low water. For example, the least depth of water over the "3.5 rock," when located on July 13, 1961, was 22 feet at mean lower low water. At the time of the casualty, if it then rested in its present posture, it was 27.4′ below the surface (FF 19, CR 152).

script, Exhibit 139, pp. 33, 36, 83, 85, 86, 100, 117, 165, 220, 286, 292)[4] (hereinafter cited as CG Tr.). Her Master, Captain Smith (and also her pilot Captain Soriano) further elaborated on this sensation as that of the ship first taking a heavy port list, then seeming to be hung up on something for a few seconds, after which the ship gained momentum and shifted to a starboard list with sort of a "fishtail motion" or "corkscrewing motion" (Tr. 579, 580, 67-69, 445-448). The deck watch officer, Mr. Gunderson, testifying at the Coast Guard hearing before the 3.5 rock was found, described the impact as follows:

> "She more or less raised up and also laid over to port about 15 degrees. Then she rolled back over to starboard about ten degrees, and actually, it felt like we rolled something over . . . after we inspected the bottom [of the vessel] I wondered if we rolled off a rock, or something like that, and that made that sensation of rolling over" (CG Tr. 286-7).

Immediately following the impact several crew members made observations astern of the vessel and saw nothing on or extending out of the water, not even kelp, only some discoloration (CG Tr. 168, 169, 180, 198, 223).

2. Damage to the ISLAND MAIL:

Both private and governmental photographs of the damaged areas of the vessel's hull were taken and received in evidence as Exhibit 37. Nine of these photographs have been reproduced in a Book of Exhibits for the use of the Court.

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4. It was stipulated that specified portions of seven volumes of the transcript of testimony at a Coast Guard Investigation into the ISLAND MAIL casualty could be received in evidence. CR 89. The pertinent volumes were marked as Ex. 139 Tr. 1145.

The photographs and the testimony establish without dispute that the initial point of impact was under the No. 1 hatch, at approximately Frame 159, at a height of approximately three feet above the keel on the starboard side (Tr. 609-10). The damage became progressively more severe proceeding aft, and terminated suddenly in the area of the forward engine room bulkhead, at approximately Frame 110, where the damage extended on both sides of the keel. The "aftermost" point of damage was in the vicinity of Frame 110, where an area 20 feet in width was "ripped out—gashed—damaged." The damage ended abruptly at that point, with only "a few score lines" extending aft. While the vessel was on dry-dock Captain Smith took rocks or rock fragments from the damaged hull in the areas of Frames 157 and 110[5] (Tr. 610-612). So did Pilot Soriano, who described the aftermost damaged area as appearing like the "crown of a helmet" (Tr. 489).

> "The indentations in the hull in vicinity of Frames 152 and 153, as evidenced by Photograph No. 1598-74 and Federal Bureau of Investigation Photographs A-2 and A-3 of Exhibit 37, conform to the contour of the westerly side of the bulge on top of the easterly side of the rock as sketched in Exhibit 119" (FF 18, CR 151-2).

The ISLAND MAIL was, as has been stated, down by her stern—that is, she was deeper in the water where the damage terminated, at Frame 110, than at the point of initial impact, Frame 159.

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5. Ship hull frames are numbered consecutively from the stern forward to the bow. Frame 159 is forward of Frame 110. See Capacity Plan (Ex. 51).

3. The Search for the ISLAND MAIL Rock:

On about June 14, 1961, during a recess in its investigation of the ISLAND MAIL casualty, the United States Coast Guard requested the United States Coast and Geodetic Survey to determine "the exact position of a reported wreck which was charted about 2½ miles roughly off the west side of Smith Island to determine the least depth over the wreckage. Also to extend the investigations sufficiently to locate any other uncharted obstruction" (CG Tr. 829-830)[6]

The undisputed findings of the survey team were as follows:

> "16. Following the incident on May 29, 1961, involving the M/V ISLAND MAIL, and during July, August and September, 1961, the Government through its Coast and Geodetic Survey undertook hydrographic and wire drag surveys in the area west of Smith Island.
>
> "The hydrographic survey of the area west of Smith Island in 1961 consisted of making accurate fathometer recordings at parallel tracks spaced approximately 100 meters apart, comparison with earlier sounding charts, and more detailed soundings of hydrographically suspicious area.
>
> "The wire drag surveys consisted of suspending a wire between two vessels at an accurate predetermined depth and sweeping an area. Any obstruction which the wire strikes causes surface buoys to submerge and this will be immediately observed by the survey party. Wire drag operations at various depths were conducted throughout the area west of Smith

6. The "reported wreck" referred to a legend placed by the Coast and Geodetic Survey on published charts of the area, following the CROCKER casualty which will be referred to in detail later in this statement.

Island. Wire dragging was limited to the westerly edge of the 10-fathom curve and did not extend inside of 1.7 miles west of Smith Island Light, except as shown on Exhibit 22 and did not extend further for the reasons stated in Exhibit 49.

"These special surveys extended over a three-month period. The position reported by Pilot Soriano and master and third-mate of the M/V ISLAND MAIL as the point of impact was determined to have a least depth as indicated on Exhibit 22.

"17. Although the hydrography undertaken in 1961 was detailed, it failed to uncover the existence of any uncharted rock at or near 48°19.35' North Latitude and 122°53.3' West Longitude. At this position a rock was thereafter discovered by Navy divers on July 13, 1961. This rock is approximately 18 feet high, 20 feet wide and 25 feet long and has a least depth of 22 feet below the surface of the water at mean lower low water. The rock is located 1.87 miles westerly of Smith Island Light. This rock will be hereinafter referred to as the 3.5 rock" (FF 16, 17; CR 149-150).

a. The rock bore marks of recent contact with metal on its *easterly* top side, as it then lay (CG Tr. 1130, 1131, 1135, 1140, 1141, 1175, 1177, 1178, 1197, 1202, 1216, 1217, 1219, 1223, 1232; Exhibits 108A and 108B).

b. The top of the rock did not appear to have been broken off (CG Tr. 1120, 1146, 1157, 1258).

c. The rock also showed that the contact with metal extended down on the rock, i.e., southerly, possibly as much as four or five feet (CG Tr. 1217, 1239, 1202).

d. Where the contact with metal on the rock was

observed, metal was actually embedded in the rock and appeared to have been driven into it (CG Tr. 1131, 1135, 1153, 1154, 1218, 1230).

c. The metal indentations or scoring on the rock were in a north-south direction (CG Tr. 1136, 1229).

f. There was evidence of sea growth, including barnacles, having been recently scraped off the rock (CG Tr. 1216-1217, 1220, 1130, 1226, 1128; Exhibit 27).

g. Near the rock were found plates of metal, pipe clamps, and other pieces of metal (CG Tr. 926, 927, 991, 992, 993, 1117, 1136, 1144, 1145, 1147, 1152, 1164, 1220, 1214, 1215).

h. The pipe clamps and some of the metal pieces which were recovered from the bottom were found to be covered with oil (CG Tr. 994, 1180, 1181, 1240) and no marine growth appeared on any of the items of metal which were recovered from the bottom (CG Tr. 1242, 1243, 994-995, 1193).

i. The metal plates which were brought to the surface appeared to have been freshly broken since the edges had a shine and where the rust had accumulated it was of such a texture to indicate it was very recently deposited in the water. (CG Tr. 1241-1242). Also near the rock were evidences of paint fragments of the type generally used on the bottom of a ship (CG Tr. 1120, 1123, 1124, 1130, 1135, 1153, 992).

j. The pieces of plate brought to the surface were found upon later analysis by the FBI Laboratory, to be metallurgically consistent with the steel in the hull of the ISLAND MAIL (Tr. 212-226; Exhibit 131).

It was the opinion of those who surveyed the rock and surrounding area that the 3.5 rock had been hit by a large ship (CG Tr. 1184, 1185; Exhibit 48).

> "The indentations in the hull in the vicinity of frames 152 and 153, as evidenced by photographs No. 1598-74 and FBI photographs A-2 and A-3 of Exhibit 37 [See Book of Exhibits] conform to the contour of the westerly side of the bulge on top of the easterly side of the rock as sketched in Exhibit 119" (FF 18, CR 151-2).

The extensive studies described by the District Court in its Findings of Fact 16 and 17 failed to disclose the existence of any other uncharted obstruction in the entire area of search, except a previously unknown group of rocks at approximately 48.19.5' N. Latitude, 122°52.9' W. Longitude, approximately 1.6 miles westerly of Smith Island Light. These rocks had a least depth of 25 feet below the surface at mean lower low water (FF 17, CR 150-151). On the plus 5.4 foot tide existing at the time of the ISLAND MAIL casualty, the least depth was 30.4 feet. No party contended below that the ISLAND MAIL struck this "4-fathom rock."[7]

4. Contact between the ISLAND MAIL and the 3.5 Rock.

The evidence establishes that the ISLAND MAIL struck the 3.5 rock and pushed it over, from west to east. The rock measured 18 feet by 20 feet by 25 feet, and as located and measured in July, 1961, its greatest dimension, 25 feet, was on a generally north-south horizontal axis and the least depth of

7. The District Court further specifically found that the 4-fathom rock was not struck by the CHARLES CROCKER in 1952 (FF 38, CR 157-8).

water over it at mean lower low water was 22 feet. At the plus 5.4 foot tide prevailing at 1542 hours, the time of striking, the top of the rock was 27.4′ below the surface (FF 19, CR 152), if it then rested in its present posture.

The draft of the ISLAND MAIL at the point of initial impact on her hull was 24' 8.64" and it is undisputed that, had the ISLAND MAIL been dead in the water with the middle of her No. 1 hatch directly over the 3.5 rock, there would have been over 2 feet 7 inches of clearance between the top of the rock (as it existed on July 13, 1961) and the vessel's keel (FF 43, Oral Opinion, Tr. 1133; FF 20, CR 152). Since the initial point of indentation in the hull was at a point three feet above the keel, there would have been over 5 feet 7 inches clearance between point of impact on ship and rock, assuming the rock to have been in the July 13, 1961 position, at the time it was struck by the ISLAND MAIL on May 29, 1961.

No evidence of any fact or circumstance which could have brought the ISLAND MAIL into contact with the 3.5 rock, as that rock lay on July 13, 1961, was submitted.

The Government did produce a witness, Anselm Beal, of the David Taylor Model Basin, who testified to the phenomenon of sinkage (CR 312-350). His testimony can be summarized briefly by saying that he testified to various increases in draft which sinkage would produce in a C-2 vessel, having the stationary drafts of the ISLAND MAIL, the extent of increase in draft being dependent primarily on speed of the vessel and depth of the water. The range of draft increases testified to by the witness was from one foot forward, four inches astern (at 15.5 knots

in deep water) (CR 320) to two feet eight inches bow and stern (at 14.7 knots after a half-mile run in 36 feet of water) (CR 321). It was later developed that the witness' calculations had been made with reference to a C-2 freighter not shown by the evidence to be sufficiently similar to the ISLAND MAIL to give validity to his calculations and his testimony was received only for the limited purpose of explaining the possibility of contact between a vessel and an underwater object where the draft and water depth, considered exclusively, would indicate a clearance (FF 21, CR 152; Tr. 348-9). In any event, as the District Court found, his testimony as to a maximum mean sinkage of two feet eight inches [under his maximum speed-minimum depth hypothesis] would leave a clearance of over two feet eleven inches between the point of indentation on the ISLAND MAIL and the top of the rock in its July, 1961 position (i.e., with a height of 18 feet) and the District Court found ". . . there is nothing in the evidence to account for this difference" (FF 43, Oral Opinion, Tr. 1136).[8]

The calculations can be presented as follows:

Depth of Water Over Top of Rock at MLLW	22′		
Plus Stage of Tide	5′ 4″		
Depth of Water Over Rock at 1542			27′ 4″
Depth of Keel at Impact Point	24′ 8.64″		
Minus Vertical Distance of Impact Point Above Keel	3′		
	21′ 8.64″		

8. The Court said 2 feet 10½ inches at Tr. 1136, but it was then using the figure +5′ 3″ for the stage of the tide. It later corrected this figure (FF 19, CR 152).

Plus Maximum Sinkage	2′ 8″	
Depth of Impact Point		24′ 4.64″
Minimum Clearance Over Rock in July, 1961 position		2′ 11.36″

Apart from the demonstrable physical impossibility of contact between the ISLAND MAIL and the 3.5 rock, *as it was positioned on July* 13, 1961, other evidence compels the conclusion that, prior to and at the time of the ISLAND MAIL striking, it rested on a different side, with 25 feet (rather than 18 feet) as its vertical dimension, and that it was rolled over by the ISLAND MAIL.

The Watch officer, Gunderson, testifying before any rock had been located by the Government, testified that "it felt like we rolled something over . . . I wondered if we rolled off a rock or something like that, and that made the sensation of rolling something over." (CG Tr. 286-7).

The initial impact on the ISLAND MAIL was on its starboard side, the east side of the vessel. Examination of the rock disclosed evidence of recent contact with metal on *its easterly* side, as it lay on July 13, 1961; clear evidence that the face of the rock which was easterly on July 13, 1961 had been its top when it was first struck by the ISLAND MAIL. No explanation for impact between the easterly sides of two objects—vessel and rock—was offered—and none can be imagined.

The District Court found that "the most probable possibility" was:

> ". . . that the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east and that the existing easterly portion of the top was formerly on the westerly side near the top. In such a position the rock would be 25 feet in

height—contact between the vessel and the rock would be possible and the areas of damage to the vessel would be consistent with the markings noted on the south side and the easterly portion of the top of the rock" (FF 43, Oral Opinion, Tr. 1138).

Appendix 5 to this brief is a graphic presentation of the evidence relating to the following:

(1) The relative drafts of the ISLAND MAIL and CHARLES CROCKER and the height above their respective keels of the initial point of damage;

(2) The stage of the tide at the time of the casualty to each vessel;

(3) The depth of water over the rock in its position as found by the divers, and in an upright position.

The sketch was presented to the trial court as an exhibit to appellant's memorandum analysis of the evidence, but was not commented upon by the Court.

5. The SS CHARLES CROCKER Struck The 3.5 Rock In 1952.

Much of the evidence at the trial related to a casualty involving the SS CHARLES CROCKER, a U. S.-flag Liberty, which struck an underwater object in the area west of Smith Island, while en route from Seattle to Alaska, on June 18, 1952.

Private Cargo submits that the evidence at trial

established that the object struck by the CROCKER was the 3.5 rock[9].

The District Court held otherwise and concluded that since the CROCKER did not strike the 3.5 rock the Government's negligence in connection with that incident was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145). Affirmatively, the Court found that on June 18, 1952, the CROCKER struck a rock somewhere *in the general area* of the rock now shown on the Government Charts as "Rock—4 fathoms—24 feet" (See Ex. 79 A). The Court acknowledged that the Crocker could not have struck the 4 fathom rock itself—over which the CROCKER would have passed with ample clearance (FF 38, CR 158; Tr. 660-6; FF 25, CR 153-4; Ex. 91, 92 a). Thus, the rock which the CROCKER struck, under the District Court finding, is a hypothetical rock, undiscovered and uncharted, about 1.6 miles off Smith Island Light.

The evidence as to the position of the CROCKER at the time of its casualty is set forth in Agreed Fact No. 16 of the Pre-Trial Order (CR 23, 24), in the Enclosures to the Order (CR 85-88) and in the trial testimony of her Master, Captain Dexter Flint (Tr. 638-711).

Briefly summarized, the CROCKER'S Master reported the striking of an obstruction two miles, 281°

9. Alternatively, if the evidence did not compel such a finding, Private Cargo contends that proper non-negligent conduct by the Government in the dissemination of information pertaining to the CROCKER casualty, would have given adequate warning to those navigating the ISLAND MAIL of the necessity for giving a "wide berth" to the area where the 3.5 rock was ultimately discovered. Failure to give adequate warning was negligence which was a proximate cause of the ISLAND MAIL casualty.

T from Smith Island Light. The initial report, relayed by Captain Flint's company to the Coast Guard, was supplemented by an official report from the Master to the Coast Guard at Seattle on July 2, 1952 and a duplicate to the Coast Guard at Portland on July 7, 1952 (Ex. 11, 12). The official report form gave the same location, two miles, 281° T from Smith Island Light, a position 790 feet, or less than two ship lengths, west of the location of the 3.5 rock.

On July 7, 1952, Captain Flint delivered a lengthy report to the Coast Guard at Portland (Ex. 14)[10] stating the same conclusion as the official report with respect to the position of striking, but setting out additional facts, including a chain of five fathometer soundings taken in the six-minute period commencing four minutes prior to the time of striking, as well as a position fix taken one minute prior to striking, which position places the vessel at that time 1.9 miles, 270° T from Smith Island Light, or only about 180 feet west of the 3.5 rock.

Captain Flint was a witness at both the Coast Guard hearing concerning the ISLAND MAIL casualty, and at the trial below. He testified positively and affirmatively to the truth of facts previously reported by him to the Coast Guard, and in particular to the position of the CROCKER striking as two miles, 281° T from Smith Island Light.

No other person aboard the CROCKER was called as a witness, and there was no other evidence

10. Printed as Appendix 2 to this Brief.

offered or received on the issue of its position at the time of striking.[11]

Cross-examination of Captain Flint by the Government at trial was brief (Tr. 693-709). No attack was made on the bearings or positions testified to by him, or contained in Exhibits 11, 12 and 14 (Appendix 2) submitted by him to the Government in 1952.

Hence, the evidence before the trial court on the issue of the position of the object struck by the CROCKER in 1952 was contained in the testimony of Captain Flint and Exhibits 11, 12 and 14. This information has been plotted on Appendix 3, of this Brief, and is as follows:

1. *Fix No.* 1. Smith Island Light was abeam at 1401 on a course of 340° T, a distance of two miles (Ex. 16). The helmsman was ordered to change course to 039° T, on a rudder angle of 5°, or "easy".

2. *Fix No.* 2. At 1405, the vessel was on a course of 360° with Iceberg Point Light dead ahead and Smith Island Light bore 1.9 miles, 90° T from the CROCKER.

3. *Fix No.* 3. Thirty seconds prior to the time of impact, the helm of the CROCKER had been put hard left, but she was just starting to swing at im-

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11. Commander Conway, the Coast Guard officer who conducted an investigation of the CROCKER incident was called by the Government and testified that he had both interviewed and taken the testimony of the CROCKER helmsman, Engineer on watch and the Second Mate. He was permitted to testify as to the information obtained by the Government from them, but "only and solely for the purpose of determining what information was available to the government" (Ruling of Trial Judge, Tr. 1023; see also Tr. 1029). Later Commander Conway was permitted to plot on Ex. 40-A his interpretation of the information obtained by him from the helmsman and second mate.

pact. By interpolation between his pre-impact and post-impact position fixes, Captain Flint determined the point of striking to have been two miles, 281° T from Smith Island Lighthouse.

It is apparent that, when considered in conjunction with the intensive hydrographic studies of a large area, supplemented by wire drag studies of the area from 1.6 to 2.27 miles west of the Smith Island Light, all of which failed to locate any other object which either the trial court or any party has now or ever suggested was struck by the CROCKER, these fixes compel the conclusion that the CROCKER could only have struck the 3.5 rock. If situated in a position with 25, rather than 18, feet as its vertical dimension, the depth of water over its top would have been 15 feet at mean lower low water (22 feet minus 7 feet), and at the plus 4′6″ tide at the time of the CROCKER casualty (FF 38, CR 158), its top would have been 19 feet six inches below the surface, which depth should be related to the CROCKER's midship draft of 21 feet 11 inches.

In the face of the incontrovertible proof afforded by the wire drags that the CROCKER could not have struck any object, other than the 3.5 rock, within the wire-dragged area, the District Court found the CROCKER struck a hypothetical rock (as yet uncharted—see Ex. 67, a chart corrected to 1963) just east of the east boundary of the wire-dragged area, the existence of which was not confirmed by the hydrographic surveys or established by any other evidence whatever.

No evidence admitted on the issue supports such a finding. The trial judge based such a finding on the testimony of a Government witness, made the Court's own witness for this purpose, interpreting

the fathometer readings set out in Exhibit 14. The instructions given the witness and his exact testimony, are of such importance that they will be extensively treated below.

The District Court found that the CROCKER struck some hypothetical object about 1.6 miles west of Smith Island Light. This finding was based on testimony of Witness Edmonston. However, as will plainly appear from the following synopsis, in his studies made at the court's direction Edmonston was restricted to two possible courses of the CROCKER off Smith Island, neither of which had substantial support in the evidence. As will further appear, his testimony amounted to no more than this: He found a fair consistency, at a distance of 1.6 miles from Smith Island Light, between two of the CROCKER's pre-impact fathometer readings—and one post-impact reading—on the one hand, and the depth datum given by the 1961 hydrographic studies on the other hand.

Witness Edmonston *did not testify* that the 1.6 mile course was most consistent of all possible courses with the CROCKER's fathometer readings. He *did not testify t*hat the fathometer readings were incompatible with a course leading the CROCKER over the 3.5 rock. It cannot be overemphasized that his testimony established only this: That the fathometer readings were inconsistent with the 2.2 mile course and that some of the readings were fairly consistent with the only alternative course given him by the Court. (No party to these actions ever contended that the CROCKER had been on a 2.2 mile course, but the witness was nevertheless instructed by the Court to test this course against the fathometer readings.)

The so-called "consistent" course at 1.6 finds other evidentiary support only in a mechanical plotting error by Witness Conway which was called to the District Court's attention and which is inconsistent with all other evidence of the CROCKER's course on June 18, 1952.

In fact, on cross-examination Edmonston agreed that west of the 1.6 mile course (i.e. in the direction of the 3.5 rock) there is a fair degree of consistency on *all* courses, until the bank slopes off west of the 3.5 rock.

Because of the extreme importance of this point we have set out below at some length a synopsis of the instructions given Edmonston by the Court, his testimony in response to those instructions and our comment in connection therewith.

1. At page 998 of the transcript, the trial judge requested the witness Edmonston, former Chief of the Nautical Chart Branch, U. S. Coast and Geodetic Survey, to take the fathometer soundings reported by Captain Flint, as set forth in Ex. 14 (Appendix 2), and relate them to the hydrographic, wire drag and diving investigations made of the area.

2. At pages 1041-1044 of the transcript, in respone to a request for clarification, Mr. Edmonston was instructed to assume, in his analysis, that the CROCKER had Smith Island Light 2.2 miles abeam on a course of 340° T, and that it thereafter swung slowly right to 039° T, at a speed of 11 knots. (No party or witness contended that the CROCKER was 2.2 miles off Smith Island Light. Captain Flint explained that the 2.2 distance, which appeared in the CROCKER log, was an error which he corrected immediately (Ex. 11, 12, 14)).

3. At page 1051 of the transcript, Mr. Edmonston was requested to make a study assuming a distance off Smith Island Light of 1.6 miles. This figure was not based on the testimony of any CROCKER witness, but on the plotting of Captain Conway, based upon his trial testimony as to the information by him from the CROCKER'S helmsman and second mate twelve years earlier.[12] In court, Conway plotted the information on Ex. 40-A as "a little over 1.6 miles" (Tr. 1048). Another Conway plot of other information from the same source produced a distance of 1.75 miles off (Tr. 1050). In fact, in arriving at the 1.6 plus distance off Conway had made a plotting error, in that he laid off a course of 339° T to Cattle Point Light, rather than 340° T. He also testified that he had plotted it several times and it usually was 1.7 off. Nevertheless the Court instructed Edmonston to "use 1.6 anyway" (Tr. 1050-1). Proper plotting of a bearing of 340° T from Cattle Point Light produces a distance off Smith Island Light of approximately 1.75 miles.

4. Mr. Edmonston was recalled as the Court's witness at Tr. 1098. At Tr. 1098, he related the five fathometer readings taken from Ex. 14 to the wire drag and hydrographic studies assuming a 1401 distance off Smith Island Light of 2.2 miles and a gradual right turn from that position to 1406, when a hard left was made. His testimony indicated that there was no correlation in the fathometer readings and the determined depths at such a distance.

5. At Tr. 1099, the witness compared the three

12. Objectionable hearsay, which was offered and admitted for the restricted purpose of determining what information was available to the Government (Tr. 1023) whether true or not.

pre-impact fathometer readings with the depth datum, assuming a 1402 position of 1.6 miles off Smith Island Light, and found lesser variations than at 2.2 miles off, i.e.

	Fathometer	*Depth Datum*
1402	11¾	less than 10
1405	8¾	6¼ - 6½
1406	6¼	5½

6. At Tr. 1099-1100, the witness was asked by the Court "whether it would be possible" for the CROCKER to have struck the 3.5 rock. His testimony was as follows:

> "THE WITNESS: Sir, I only have one sounding, and that is eight and three-quarters, that I could use in determining the position, assuming that the three and one-half, at the six and one-quarter when he turned hard left, and that eight and three-quarters would be in agreement with the soundings on the hydrographic survey.
>
> "THE COURT: So on the soundings—
>
> "THE WITNESS: You have only one sounding to judge it by.
>
> "THE COURT: I see.
>
> "THE WITNESS: That is all. That one sounding would be in agreement between the six and one-quarter on the top of the rock of three and one-half fathoms."

7. At Tr. 1101, Government counsel inquired into the comparison at 1.6 miles off Smith Island Light. The witness stated:

> ". . . at 1.6 miles we have two soundings that agree fairly well with the hydrography."

He later modified this to say that three of the five readings (including one post-impact reading based

on the witness' assumption of the CROCKER'S course change following her hard left rudder at 1406) were fairly consistent with the depth datum (Tr. 1105-6).

8. At Tr. 1108, the witness compared the fathometer readings with the depth datum, assuming a starting position of 1.8 miles off Smith Island Light with the following results:

Time	*Fathometer*	*Depth Datum*
1405	8¾	8-10½
1406	6¼	9½-10
1407	9¾	12
1408	11¾	16

In response to the Court's question "So that isn't too inconsistent?", the witness replied "No, sir." (Tr. 1108).

The District Court's use of this testimony as a basis for its finding that the CROCKER struck a rock entirely outside the area of intensive investigation and wire-drag studies made by the Government following the ISLAND MAIL casualty must be viewed in the following light:

1. The 1.6 mile distance off used by the witness, and testified to by him as being "fairly consistent" with the depth datum was predicated on Conway's hearsay testimony as to the information obtained from other persons. Such testimony was admitted "whether true or not" solely to show "what information was available to the government" (Tr. 1023). Moreover, Conway had erred in his plotting—there was no evidence before the Court, hearsay or otherwise, which would place the CROCKER less than 1.75 miles off at 1402.

2. The hydrographic surveys were a slender reed to bear the burden attempted to be placed upon them. They are nothing more nor less than recordings of fathometer readings made on parallel tracks spaced approximately 100 meters apart (FF 16, Tr. 150). They record and chart the depths on the parallel tracks—they do not record or chart the depths between the tracks. The soundings recorded were not made by a vessel following the course of the CROCKER. Certainly some, and probably all, of the CROCKER soundings were made in the interstices between the hydrographic survey soundings.

3. The witness, in constructing the overlay (Ex. 138) which he used as a basis for his comparison, attempted to trace the track and speed of the CROCKER prior to impact as well as possible from the information available to him in Ex. 14 (Tr. 998), but there was no reliable information available to him to lay out the course of the vessel after the hard left rudder, at 1406, followed by the impact and the roll to port. The post-impact soundings are obviously meaningless in view of the wholly arbitrary course line laid out for the 1407 and 1408 readings.

4. There was no testimony whatever tending in any way to indicate either that the witness was qualified to undertake to position the CROCKER on the basis of the datum available to him, or that the method which he employed was a recognized and sufficiently reliable method of doing so. In fact there was no testimony that the method used had ever been used before.

5. The witness did not testify that in his opinion the datum submitted to him established that the CROCKER was approximately 1.6 miles or less off

Smith Island Light. Rather, he testified that the fathometer readings of the CROCKER were "fairly consistent" with such a distance, but also that they were not "too inconsistent" with a distance of 1.8. No one contended at trial, and no one contends now, that the distance off was 2.2 miles, which his testimony tended to eliminate as a possibility.

6. Government Negligence Following the CROCKER Casualty.

Following the CROCKER casualty of June 18, 1952, her Master initiated four reports to the Government.

The first, a radio message to the ship operator's Seattle office, was relayed by it to the Coast Guard, both verbally and in writing on June 19, 1952. It appears verbatim in the Pretrial Order at Tr. 25, and indicated, in substance, that the CROCKER had hit an obstruction at a distance of two miles from Smith Island Light, bearing 281° T, and that it was believed to be sunken wreckage.

On June 19, 1952 a radio notice to Mariners was issued by the Coast Guard, reporting that the CROCKER had "struck obstruction two miles 281° T from Smith Island Light." (Tr. 26).

The position of the obstruction reported by the CROCKER in its first report (and all subsequent reports) was approximately 800 feet west of the now established location of the 3.5 rock (See Ex. 79A).

Also on June 19, 1952, at the request of the Seattle office of the Coast Guard, the USCG Patrol Boat 83484, conducted a 90-minute sonar and visual search for the reported wreckage. Although the reported position of striking was northwest of

Smith Island Light (*i.e.,* 281° True), the vessel's log indicates that the search area was two miles SW of Smith Island (PTO, Par. 17, CR 27). In response to a Request For Admission, the Government admitted the area of search was "Two miles *southwest* of Smith Island" (Tr. 716). At trial, the Chief Boatswain in charge of the 83-foot patrol craft at the time of the search some 12 years earlier was permitted to testify, over objection, contrary to his log, the only contemporaneous written record, and to the Government's Admission, that the area of search was "about, oh, 1.5 miles to 2 miles to the westward of the island light . . ." (Tr. 718). The patrol boat had no fathometer (Tr. 720). It reported no contacts or results at all (Tr. 724).

No other search or investigation to determine the character, location, depth or height of the obstruction struck by the CROCKER was conducted by the Government until after the ISLAND MAIL casualty (PTO, Par. 17, CR 17; FF 32, Tr. 155A).

On June 27, 1952, there was filed with the Coast Guard at Seattle the CROCKER's Report of Marine Casualty, prepared by Captain Flint on June 19, 1952 (Ex. 11, CR 85) reporting that the vessel had "apparently scraped over wreckage or other uncharted danger" at a position two miles, 281° T from Smith Island Light. A duplicate report was filed by Captain Flint with the Coast Guard at Portland, Oregon, on July 7, 1952 (Ex. 12, PTO, Par. 16 e, CR 26). In the space provided for "Recommendations for Corrective Safety Measures", Captain Flint stated as follows:

> "In view of the fact that all ships bound to or from Rosario Strait, Anacortes, Bellingham or Blaine must now pass West of Smith Island

> since the regular channel to the East of it is now closed by the navy the waters West of Smith Island should be thoroughly examined and this uncharted danger located and buoyed as a protection to shipping." (CR 86—Item 33).

His recommendation for location of this uncharted danger was repeated in a narrative letter report from Captain Flint to the Coast Guard, Portland, dated July 7, 1952 (Ex. 14), which is printed in the record at 87-88, and as Appendix 2 to this brief. In Ex. 14, Captain Flint states that the object was "either submerged wreckage, possibly a sunken target from the nearby Naval Operations Area, or a pinnacle rock." He also added to previous reports a fix obtained one minute before striking, *viz.,* Iceberg Point Light dead ahead on a course of 360° T, with Smith Island Light abeam, or a bearing of 90° T. This fix is plotted in Appendix 4 to this brief as "Fix 2—1405 position." The narrative report also set forth five fathometer readings taken during the 6-minute interval commencing four minutes prior to the impact.

The CROCKER was drydocked for inspection and repair of her damage (at a cost of $60,000.00) at Portland from July 12 to 21, 1952 (FF 33, CR 155A). While drydocked, its bottom was inspected, and in the presence of a Coast Guard officer, a piece of broken rock was removed from the damaged area of the vessel "from which the inference could easily be drawn that the vessel struck a rock rather than submerged wreckage" (FF 37, CR 157).

Commander Conway conducted an investigation into the CROCKER casualty, which included interviewing and taking the testimony of the CROCK-

ER's mate and helmsman (Tr. 1017, 1022, 1208). These men were not called as witnesses at the ISLAND MAIL trial, and, of course, were never subject to cross-examination on behalf of Private Cargo (or any other party to these actions). Conway's testimony as to the information he obtained from them was offered and admitted "only and solely for the purpose of determining what information was available to the government . . . Whether true or not." (Tr. 1022-23).

Commander Conway's determination was that the CROCKER sustained its casualty inside the 10-fathom curve, but he could not determine where (Tr. 1054). It could have been in the outermost kelp area (Tr. 1055), although he admitted that all witnesses questioned by him testified they saw no kelp (Tr. 1081).

Commander Conway had received a copy of the Notice to Mariners reporting the striking of an obstruction at two miles, 281° T from Smith Island Light (Tr. 1058). Although he concluded that the CROCKER casualty had occurred somewhere inside the 10-fathom curve, and although a Coast Guard internal instruction required reporting to the Corps of Engineers or the Coast and Geodetic Survey "if something isn't right", he made no report to the Coast and Geodetic Survey (Tr. 1056-57). With reference to the "Wreckage Rep." which he knew had been a symbol placed on the charts by the Coast and Geodetic Survey, he took no action (this symbol is discussed at length below). Asked why, his testimony was:

> "My determination was that this grounding was due to failure to take bearings. That is what I was to determine. The Coast and Geo-

detic Survey, I don't know whether or not they ever had—whether he hit a wreck or a submerged object, or what he hit. I just let it sit there. There was nothing I could do about it; it was reported. It is advisory, and that was my contention there still may be a wreck there; I don't know." (Conway, Tr. 1061-2).

In addition to the radio Notice broadcast to Mariners on June 19, 1952 (CR 28), there was published by the U. S. Navy Hydrographic Office, on the same date, the following written notice, termed a "HYDROPAC".

> "Sunken wreckage reported position 48° 19′32″ N, 122° 53.40″ W." (CR 28)

On July 5, 1952, a written Weekly Notice to Mariners, published by the Coast Guard and Hydrographic Office, stated as follows:

> "Sunken wreckage has been reported in 48° 19′32″ N., 122° 53′40″ W. A danger circle with the note 'wreckage—rep. 1952' will be charted in the above position."

Both the HYDROPAC and the published Notice to Mariners gave inaccurate cordinates for the position of the obstruction reported by the CROCKER—placing the "sunken wreckage" over 700 feet (Wennermark, CG Tr. 898) northwest of Flint's reported position (See Ex. 79A). Even more importantly, neither gave any warning that the reported object was a danger to surface navigation or that it had been struck by a vessel having a mean draft of 21 feet 11 inches.

Thereafter, between July 14 and October 13, 1962 a symbol "Wreckage Rep. 1952" was placed on Coast and Geodetic Survey Charts of the Smith Island area, together with a small circle, tinted on some

charts, but not on others (Tr. 28). The circle was centered over 700 feet northwest of the CROCKER's reported position, conforming to the HYDROPAC and Notice to Mariners.

No other action was taken by the Government with respect to charts, notices or publications relating to the Smith Island area until after the ISLAND MAIL casualty and the investigation which followed.

The May 29, 1961 edition of the Coast Pilot, a publication of the Coast and Geodetic Survey, gave no notice of dangers in the area west of Smith Island, except as follows:

> "A field of kelp extends about 1.5 miles westward of the island, with *a width of* 1 *mile and depths of* 4½ *to* 5 *fathoms*. A sunken rock, bare at lowest tides, is reported 0.3 mile westerly of the light." [Emphasis supplied] (CR 21).

On January 6, 1962, six months after the ISLAND MAIL casualty, the italicized language was changed, and additional language added as follows:

> ". . . *width of about* 1.5 *miles over depths of* 4 *to* 6 *fathoms;* a rock covered by 3¾ fathoms lies about 1.8 miles eastward of the light. A rock that bares at lowest tides is about 0.3 mile westerly of the light. Strong currents set in and around the shoal area, especially on the flood, and deep-draft vessels should keep well outside the 10-fathom curve to avoid being set into danger." [Emphasis supplied] (CR 21).

The statement that the 3.5 rock is east of Smith Island was, of course, totally incorrect and this error was subsequently corrected in the Coast Pilot (CR 21-22).

The Government's witness, Edmonston, testified

that the only information received by the Nautical Chart Division of the Coast and Geodetic Survey relating to the CROCKER incident was the weekly Notice to Mariners (Tr. 963) which gave the position reported by the CROCKER incorrectly. The Coast and Geodetic Survey did not know that the reported obstruction had been struck by a vessel, or its draft, and made no inquiry (Tr. 964). The Government stipulated that the Coast and Geodetic Survey did nothing to verify or confirm the existence or nature of the obstruction for which it placed the "Wreckage Rep." legend on its charts (Tr. 965).

Edmonston's interpretation of the meaning of the charts, as to depths of water in the area of the legend, "Wreckage Rep.," was that there were twenty fathoms (Tr. 968-9).

His office did not place the symbol prescribed in Chart No. 1 (Ex.16) under 0.17 indicating "foul ground" in the area west of Smith Island, inside the 10-fathom curve, because they had no information that it was foul ground (Tr. 974).

The "Wreckage Rep." legend was used, without any indication of depth, because his office had no information as to depth, as to the type of obstruction, or in fact that it had been struck by a surface-navigating vessel (Tr. 976). In contrast, after the ISLAND MAIL casualty, *but before discovery of the* 3.5 *rock,* the symbol under O (Oh), with depth of four fathoms, was placed on the charts to clearly indicate a danger to surface vessels of such draft (Tr. 976, Ex. 78).

Edmonston testified that had Captain Flint's narrative report (Ex. 14, Appendix 2) been received in his office, the information would have been taken up with the Navy Hydrographic Office, additional

notices to mariners would have been published, and the charts would have been revised (Tr. 982-84). The District Court found that Ex. 14 would have been of value to the Coast and Geodetic Survey, and that it could have determined the approximate position of the CROCKER casualty, had it obtained such information.

Aboard the ISLAND MAIL at the time of the casualty were current and corrected issues of the applicable United States Coast and Geodetic Survey Charts Nos. 6380, 6450 and 6300 covering the casualty area, prepared by the United States (FF 8, CR 147) and required by regulations to be carried aboard (46 C.F.R. 97.05-5). The responsibilities and functions of the Coast Guard and Coast and Geodetic Survey with respect to charts and assistance to navigation and navigators are specified in Title 14, U.S.C. §§ 2, 81 and Title 33 U.S.C. § 883a, respectively. The applicable portions of these statutes are set out in Appendix 1.

With respect to such charts, then, in summary, the following appears:

(1) The legend "Wreckage Rep.—1952" is shown on *all* such charts over 700 feet northwest of the position given in the report on which the legend was based (Wennermark, CG Tr. 898);

(2) The wording of the legend gave no notice to users of the chart that a vessel having a maximum draft of 24′2″ (the after draft of the CROCKER had struck an obstruction in the vicinity, or that there was any known danger to surface navigation by vessels having a maximum draft of 29′2″ such as the ISLAND MAIL. The least depth of available water was not shown, and the soundings given for

the immediate area were affirmatively misleading. The Government official in charge of their preparation interpreted them to indicate twenty fathoms of water in that area. The Coast and Geodetic Survey had no information that a surface vessel had struck the reported object.

(3) The Government failed to use symbols designated by it (in Ex. 16) to indicate that the position of the reported object was doubtful or unverified, although the Government's own personnel were uncertain of its existence and location. (Position approximate; position doubtful—See Ex. 16).

(4) A cursory Government search following its receipt of the report of the striking was directed to an area southwest of Smith Island, although the report made gave the locations as "2 Miles, 281° T" (or north of west).

(5) Although the Government knew in 1952 that the CROCKER, having a deep draft of 24'2" had struck a rock, no appropriate information was ever placed on the charts, and the earlier entry of "Wreckage Rep.—1952" was never deleted or corrected until after the ISLAND MAIL casualty.

(6) Although the Government received, in the course of its investigation of the CROCKER casualty, information on the basis of which according to its own witnesses, changes to the charts which were aboard the ISLAND MAIL would have been made, and further hydrographic or area drag studies might have been conducted in 1952, such information was never acted upon.

III SPECIFICATION OF ERRORS

1. The District Court erred in finding that in 1952 the SS CHARLES CROCKER struck an object

in the area of 1.6 miles west of Smith Island Light. (FF 38, CR 158).

2. The District Court erred in failing to find that the CHARLES CROCKER struck the same rock as the ISLAND MAIL, or an object in such proximity with such rock that a reasonable search for the location of the object reported by the CROCKER would have disclosed the existence and location of the 3.5 Rock.

3. The District Court erred in failing to find that the Government, through the United States Coast Guard, knew that the object struck by the CHARLES CROCKER on June 18, 1952, was a rock dangerous to surface navigation, and particularly to commercial vessels engaged in voyages between Puget Sound and Bellingham, Washington, and other places.

4. The District Court erred in failing to find that "the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east."

5. The District Court erred in finding and concluding that negligence of the United States was not the proximate cause or a contributing proximate cause of the striking of the ISLAND MAIL, and in failing to find and conclude that such negligence was a proximate cause of such striking and resultant damage and expense. (FF 39, CR 158; Conclusion 2, CR 160).

6. The District Court erred in failing to find that the 90-minute sonar and visual search performed by U.S.C.G. Patrol Boat 83484 on June 19, 1952, was not a proper, adequate, non-negligent discharge of the Government's responsibility to endeavor to obtain reasonable information, upon receipt of reports

indicating the existence of dangers to surface navigation, on which to base its charts, notices, bulletins and other publications to mariners and vessels navigating said waters.

7. The District Court erred in failing to find that a reasonable search of the area of impact reported to the Coast Guard by the CROCKER would have disclosed the existence and location of the 3.5 Rock and that failure to make such a reasonable search was negligence, which negligence was the proximate cause of the striking of the ISLAND MAIL and loss and damage to her cargo.

8. The District Court erred in finding that the search made by the United States Coast Guard in June 1952 as a result of the report received from the SS CHARLES CROCKER, covered an area generally west of Smith Island, instead of southwest as reported in the log of the vessel that conducted said search and as stipulated by the parties before trial. (FF 32, CR 155 A).

9. The District Court erred in failing to find and conclude that the United States had assumed the responsibility of providing information to mariners of the existence of dangers to surface navigation in heavily-traveled waters when such dangers are reported to it, and that having undertaken to provide notice or warning of such dangers it assumed the duty to do so in a proper manner.

10. The District Court erred in failing to find that Puget Sound pilots and navigators in such waters rely and are entitled to rely on information published and supplied in U. S. Coast and Geodetic Survey Charts and in the Coast Pilot in the navigation of vessels in waters including the waters westerly of Smith Island, and that Pilot Soriano so relied

in the navigation of the ISLAND MAIL.

11. The District Court erred in finding that the symbol "Wreckage Rep. 1952" placed on the published charts by the United States Coast and Geodetic Survey in 1952 was proper in view of the information then in the possession of the Government and in referring to said symbol as a danger circle. (FF 31, CR 155 A).

12. The District Court erred in failing to find that the legend "Wreckage Rep.—1952" placed on United States Coast and Geodetic Survey Charts westerly of Smith Island by the Government between 1952 and 1961 was inaccurate, affirmatively misleading, incomplete, and contrary to the actual knowledge of the United States, and that said legend and the location thereof induced reliance by mariners that there was a safe passage easterly of the location of said symbol.

13. The District Court erred in finding that the negligence of the Government in failing to publish to mariners through charts, notices or bulletins information concerning the striking of the CROCKER which it had obtained from the vessel's Master, its log and from Government inspection of the vessel's hull was the result of lack of a plan for coordination and dissemination of information amongst Government agencies. (FF 41, CR 159).

14. The District Court erred in failing to find that if the Government had properly charted and published the information furnished to it after the CHARLES CROCKER striking in June 1952, navigators and pilots, including Soriano who was piloting the ISLAND MAIL, would have been warned of dangers to surface navigation from underwater obstructions and would have avoided the area where

the ISLAND MAIL striking later took place. (FF 40, CR 158).

15. The District Court erred in finding that the striking of the ISLAND MAIL was caused solely by negligence of Pilot Soriano (contrary to its finding in *United States v. Soriano*). (FF 40, CR 158).

16. The District Court erred in finding that the 10-fathom curve was a definite warning of danger in the waters surrounding Smith Island and in further finding that it was negligence to navigate the ISLAND MAIL, having a mean draft of 26′7″, on the outer limits of such curve at a time when there was a tide of plus 5.4 feet. (FF 15, CR 149).

17. The District Court erred in finding that Pilot Soriano failed to check the position of the ISLAND MAIL and in failing to find that the slight inaccuracy of the Kenyon calculator used by him for some bearings was corrected by the angle of the center window of the vessel's pilothouse when the evidence showed that such angle would correct rather than increase the slight inaccuracy of the calculator. (FF 11, 40, CR 148, 158).

18. The District Court erred in failing to find that, had information available to the Government been properly charted, the ISLAND MAIL would not have struck the 3.5 rock.

19. The District Court erred in entering a decree dismissing the libel herein and in failing to enter a decree that the appellee was liable in damages to the appellants.

IV

ARGUMENT

A. Argument on specifications one to five

The District Court erred in failing to find that the ISLAND MAIL had struck the 3.5 *Rock, pushing it over from west to east, and that the CROCKER had struck the rock in its former position in* 1952. *These facts were established by a preponderance of the evidence. Its finding that the CROCKER struck a rock in the general area of* 1.6 *miles off Smith Island Light was clearly erroneous.*

Private Cargo and the Government stipulated that the ISLAND MAIL struck the 3.5 rock. The evidence, reviewed at pages 12 to 19 of this Brief, establish that fact, independently of the stipulation. The rock is within approximately 1200 feet of the position of striking reported by the Master and Third Mate (Ex. 79A) and showed incontrovertible evidence of having been recently struck by a vessel. The pieces of steel plate found near the rock were of the same metallic composition as the plates of the ISLAND MAIL. No other recent striking in the area had been reported. An exhaustive search by the Government[13] failed to reveal any other possible obstruction to account for the damage to the ISLAND MAIL.

The proof was equally compelling that at the time

13. The search was to determine "the exact position of a reported wreck which was charted about 2½ miles roughly off the west side of Smith Island to determine the least depth over the wreckage. Also to *extend the investigation sufficiently to locate any other uncharted obstruction.*" (CG Tr. 829-30) [Emphasis supplied].

it was struck by the ISLAND MAIL, the 3.5 rock was resting on a different face, and that its vertical dimension at that time was 25 feet rather than 18 feet.

It was a demonstrable physical impossibility for the ISLAND MAIL, stipulated and proven to have struck the 3.5 rock, to have done so with the rock in the posture in which it was found on July 13, 1961. So situated, there was a clearance of over 5 feet 7 inches between the rock and its point of impact on the vessel (See *supra* p. 17). Government efforts to close the gap consisted solely of testimony offered to show a maximum sinkage of 2′8″, and the District Court found that even that amount of sinkage was not established (Tr. 349). In any event, the Government's testimony wholly failed to explain or suggest how the ISLAND MAIL could have struck the rock in its July 1961 position with a height of 18 feet—*i.e.* with its top 27′4″ below the surface, and the District Court expressly found ". . . there is nothing in the evidence to account for this difference." (FF 43, Oral Opinion, Tr. 1136).

Other evidence was inconsistent with contact between the ISLAND MAIL and the rock in its July 1961 position. As positioned then, the evidence of contact with a vessel was on the rock's easterly face, whereas damage to the ISLAND MAIL was initiated on its easterly side (or starboard side, with the vessel proceeding generally north).

The District Court found that "the most probable possibility" was:

> ". . . that the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east and that the existing easterly portion of the top was formerly on the westerly side near the top.

> In such a position the rock would be 25 feet in height—contact between the vessel and the rock would be possible and the areas of damage to the vessel would be consistent with the markings noted on the south side of the easterly portion of the top of the rock." (FF 43, Oral Opinion, Tr. 1138).

The District Court found that:

> ". . . there was nothing in the general area of the positions of impact estimated by Soriano, Smith and Gunderson which the vessel could have struck. In fact, the 3.5 Rock had the least depth of water over it of any object within a considerable area and was the only object revealed by the drag operations with which any part of the ISLAND MAIL could conceivably have made contact." (FF 43, Oral Opinion, Tr. 1134).

Nevertheless, the District Court rejected Appellant's contention that the 3.5 rock had been struck and pushed over although it was "the most probable possibility" and "convincing and plausible" (FF 43, Oral Opinion, Tr. 1138, 1143). The District Court held that "there is no evidence that such happened, nor is there evidence which would support such an inference." (FF 43, Oral Opinion, Tr. 1137). It held that such a finding would be "premised on speculation" (FF 43, Oral Opinion, Tr. 1137, 1143) and "not supported by the evidence." (*Id.,* 1143).

What more is needed to establish that the rock was formerly in a posture such as to permit the vessel to strike it, and to leave marks on what is now the easterly side of the rock, and that the rock was overturned by the force of the impact? Only this: That no one observed and made measurements of this undiscovered rock prior to May 29, 1961, and,

of course, no one was in a position, beneath the surface of the water, to observe the impact.

It will be remembered, however, that Third Mate Gunderson described the action of the ISLAND MAIL as being "like we rolled something over" (CG Tr. 286-7), and that one Navy diver conceded that based on his inspection the rock could have been rolled over. (CG Tr. 1158-59, 1174).

Could the ISLAND MAIL have moved the rock? The question answers itself. This vessel displaced (*i.e.,* weighed) approximately 15,000 long tons and was moving at a speed of about 20 feet per second. A rock 25' x 20' x 18' contains 9,000 cubic feet. At the weight of solid lead (about 707 lbs. per cubic foot) the rock would have been less than 1/5 the weight of the vessel which struck it.

On this state of facts the District Court, although convinced as a practical matter that the rock had been overturned, felt constrained to stop short of so finding because it thought that these convincing circumstances gave rise to no more than "speculation".

Appellants respectfully suggest that the District Court's attempt to envision circumstances productive of the known state of facts (as by an unreported striking by some other deep draft vessel) without an overturning of the 3.5 rock is the only speculation with respect to this phase of the case.

In a very recent decision involving the striking of an underwater obstruction by a vessel, *Whorton v. T. A. Loving & Co.,* 344 F.2d 739, 742 (4th Cir. 1965), the Court of Appeals for the Fourth Circuit said:

> "We are of the opinion that the evidence before the trial court was amply sufficient to create and support the inference that the Boots sank

> as a result of striking a steel "I" beam, part of the fender system of the old bridge, which Loving was under an obligation to remove; in fact, such inference is, in our opinion, inescapable. Short of producing as a witness someone who participated in driving the beam into the bottom of the waterway during the construction of the old bridge and who could, by some means, identify that particular beam as the one that caused the damage, it is difficult to conceive what other proof Whorton could have produced. Direct evidence of a fact is not always required. Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence. Michalic v. Cleveland Tankers, Inc. 364 U.S. 325, 330, 81 S.Ct. 6, 5 L.Ed.2d 20 (1960). In Williamson v. Williams, 137 F.2d 298, 299 (4 Cir. 1943), this court said: '* * * inferences arising from admitted circumstances may sometimes be strong enough to outweigh the most positive and direct oral statements.' Fact finding does not require mathematical certainty. Schultz v. Pennsylvania R. Co., 350 U.S. 523, 526, 76 S.Ct. 608, 100 L.Ed. 668 (1956)."

This statement is entirely in accord with the law as announced by the United States Supreme Court and this Court.

In *Michalic v. Cleveland Tankers, Inc.,* 364 U.S. 325 (1960), at 330, the Court said:

> "But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'

This Court's remarks in *Fegles Const. Co. v. McLaughlin Const. Co.,* 205 F.2d 637 (9th Cir. 1953), are particularly applicable to the District Court's speculation concerning the possibility of an unre-

ported major marine disaster. The Court said at page 639:

> "These findings are attacked on the ground that the evidence is insufficient as a matter of law to support them; that a substantial portion of the evidence relied upon is circumstantial and subject to the rule that if the conclusion reached from the facts in the chain of circumstances is equally consonant with the issues to be proven and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied, citing Shaw v. New Year Gold Mines Co., 1937, 31 Mont. 138, 77 P. 515."
>
> "This is a correct statement of the law, not only in Montana, but in most, if not all, jurisdictions. However, it does not alter the general rule that in civil cases a preponderance of the evidence is sufficient to establish the fact in issue. While the plaintiff must show that the inferences favorable to him are more reasonable or probable than those against him, the circumstantial evidence in civil cases need not arise to that degree of certainty which will exclude every other reasonable conclusion.
>
> * * * *
>
> "The evidence here not only supports the inference that the fire was caused by hot rivets, but it attains a greater degree of certainty than demanded by the rule, as it excludes every other *reasonable* hypothesis. The appellants suggest, as the cause of the fire, the possibility of arson, spontaneous combustion, a lighted cigarette or a discarded match. The short answer to that is that there is no evidence, direct or circumstantial, from which it could reasonably be inferred that the fire started from any of the suggested possibilities. As stated in the

> memorandum opinion of the trial court, 'plaintiff is not required to conjure up mere possibilities or set up straw men just to knock them down'. We conclude that the findings are not clearly erroneous." [Footnotes omitted]

It is to be noted again that in the present case the District Court said that the "most probable" explanation of the ISLAND MAIL casualty was that the 3.5 rock had been pushed over by the impact. This is to be compared with the test of the *Schneider* case[14] ("more likely than not") and in the *Fegles* case ("more reasonable or probable" than the contrary inferences).

Measured against these legal standards, the District Court's conviction that it was precluded from finding the existence of what it termed "the most probable possibility", because that would be "speculation" was clearly erroneous.

Likewise erroneous were the District Court's findings that the CROCKER did not strike the 3.5 rock, and that it struck a rock "in the general area" where the 4-fathom rock was found (Ex. 79A), *i.e.,* approximately 1.6 miles west of Smith Island Light and .27 miles east of the 3.5 rock (FF 38, CR 158). The Court specifically found that the CROCKER did not strike the 4-fathom rock (*Ibid.*).

The District Court based its findings on the fact of clearance between the CROCKER'S keel and the top of the 3.5 rock (as positioned in 1961) and on the interpretation it put upon the testimony of Mr. Edmonston (*Ibid.*).

If, as Private Cargo maintains, the evidence established that the ISLAND MAIL pushed over the 3.5 rock, and that prior to May 29, 1961, it was 25 feet

14. Schneider v. Yakima County, 65 Wn.2d 333, 397 P.2d 411 (1965), more fully discussed below.

high rather than 18 feet, the least depth of water over it at mean lower low water at the time of the CROCKER casualty was 15 feet rather than 22 feet, and at the then stage of the tide, namely plus 4.5 feet, the top of the rock was 19.5 feet below the surface, and would thus be contacted by a vessel having the CROCKER's mean draft of 21 feet 11 inches.

Appendix 5 illustrates the testimony as to the dimensions of the rock, its height in an upright position, the stages of the tide at the time of the ISLAND MAIL and CROCKER casualties, and the drafts of the two vessels at their respective points of impact with a rock. It demonstrates that appellant's position is consistent with all the known physical facts, and in conjunction with the other evidence, compels the conclusion that the CROCKER, as well as the ISLAND MAIL, struck the 3.5 rock which, on and before May 29, 1961, had a vertical height of 25 feet.

Preliminarily, it bears repeating that no other rock which could have been struck by either vessel has ever been found. There is literally no evidence whatever of the existence of any rock which the CROCKER could have struck at or near the position where the District Court found she did strike a rock.

Although the exhaustive search conducted by the Government following the ISLAND MAIL casualty was directed to determination of the location of the obstruction reported by the CROCKER, and was "to extend . . . sufficiently to locate any other uncharted obstruction" (CG Tr. 829-30) no obstructions other than the 3.5 rock and the 4-fathom rock (which was concededly not struck by the CROCKER) were found. The most recent edition of the Coast Pilot refers to no such rock (CR 22). The

most recent chart of the area in evidence (Ex. 67) indicates no such rock.

Proof that the CROCKER struck the 3.5 rock does not rest solely on the complete absence of any evidence of any kind as to the existence of any other possible rock. It was fairly established by the evidence before the District Court on the issue of her position at the time of the casualty.

All reports from the CROCKER to the Government, the initial radio message relayed to the Coast Guard (FF 26, CR 154), the two Reports of Marine Casualty (Ex. 11, 12) and the narrative report of Captain Flint (Ex. 14, Appendix 2), placed the casualty at 2 miles, 281° T from Smith Island Light, *i.e.*, .13 miles, or approximately 790 feet west of the 3.5 rock.

A position determined by cross-bearings taken by her Master one minute before collision (Ex. 14 and Appendix 2 to this Brief) placed her approximately 500 yards south and only about 180 feet west of the 3.5 rock (while proceeding in a gradual turn from 340° T towards a new course of 039° T).

Even the hearsay evidence of Conway as to the statements of other CROCKER personnel (not admitted to establish the position of the CROCKER, but only to show the information available to the Government) correctly plotted, places the CROCKER in the immediate vicinity of the only possible candidate for her striking, the 3.5 rock.

Conway testified that the Second Mate and Helmsman told him that at 1402 hours the CROCKER was on course 340° T, with Cattle Point Light dead ahead, and Smith Island Light abeam. When he plotted that position, he laid off a course of 339° T, as examination of Ex. 40A will plainly disclose.

Accurate plotting of the datum to which he testified would produce a distance off of approximately 1.75 miles. Indeed, Conway's own testimony established that the CROCKER was 1.7 or 1.75 miles off when abeam (Tr. 1050-51).

The 3.5 rock, at a distance of 1.87 miles off the Light, is precisely bracketed by the positions testified to by her Master, on the one hand, and by Conway, based on the Second Mate and Helmsman on the other.

Further, taking the 1402 position to which Conway said the Second Mate and Helmsman testified, and projecting the CROCKER's course of "Right Easy" keeping Smith Island Light abeam (Tr. 1037) takes the CROCKER through the dotted circle surrounding the 3.5 rock on current charts. (See Appendix 4 with the course line marked "Right Easy.")

A similar result follows from taking the 1402 position to which Conway testified, and projecting the "mean" course of the CROCKER at 355° T. (See Appendix 4). The evidence of the helmsman, according to Conway, was that he had been ordered to come right on a 5° right rudder, that his practice was to call out courses each time the vessel had come 10° from her previous course, and that he had called out two or three times before receiving the order "Hard Left" just before impact, *i.e.,* between 1402 and 1406 (Tr. 1073-5).

Edmonston's testimony that the fathometer readings of the CROCKER were "fairly consistent" with a distance off Smith Island Light of 1.6 miles is thus without any underlying support by way of evidence, much less substantial evidence, that the CROCKER was in such proximity to the Light. The Court's

"adoption" of his testimony,[15] and its finding that the uncharted rock struck by the CROCKER was in that general area is thus unsupported by evidence and clearly erroneous.

It is perhaps worth noting that the Government, which employed both Conway and Edmonston (the latter prior to his retirement), presented both as its witnesses, and had access to all the information on which Edmonston's testimony as the Court's witness was predicated, did not see fit to offer such testimony.

To summarize, the contemporaneous reports of the CROCKER's Master and his in-court testimony, which was subject to cross-examination, placed the CROCKER two miles off Smith Island Light at the time of the casualty. Conway's testimony, as to the information obtained by the Government from the Second Mate and Helmsman, properly plotted, would place the CROCKER 1.75 miles distant from the Light. This evidence brackets the 3.5 rock, found to be 1.87 miles west of the Light, and each would have the vessel passing between 700 to 800 feet of the 3.5 Rock (one to the east, and one to the west). An exhaustive study by the Government, including wire-dragging, failed to disclose the existence of any other object which could have been struck by the CROCKER. The District Court's finding that it struck some other rock, not shown to

15. Edmonston did *not* testify that he concluded the CROCKER was approximately 1.6 miles off the Light, but only that her fathometer readings were "fairly consistent" with such a distance. They were "not too inconsistent" with a distance off of 1.8 miles, the only other distance at which Edmonston was requested to make a comparison, apart from the 2.2 mile distance for which no one contended and to which no one testified.

exist, and its failure to find that it struck the 3.5 rock, were clearly erroneous.

> "A finding is clearly erroneous when the reviewing court has a definite and firm conviction that it is a mistake, viewed in the light of all the evidence. This is so, even though there is some evidence to support the finding. United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); McAllister v. United States, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954)."
>
> *Apex Mining Co. v. Chicago Copper & Chemical Co.*, 340 F.2d 985, 987 (8th Cir. 1965).

The District Court found the Government negligent, "perhaps grossly so", in the publication of erroneous information and in its failure to correct such information. It found that the Coast and Geodetic Survey would "probably" have removed the symbol "Wreckage Rep.—1952", and that, if it had been fully advised with respect to the information known by the Coast Guard it would have replaced it with a symbol identifying a rock or obstruction with a notation "Position Approximate" or "Position Doubtful" on the chart. (FF 43, Oral Opinion, Tr. 1143; FF 41, CR 159). But, since it found the CROCKER did not strike the 3.5 Rock, it held that such negligence was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145; FF 39, CR 157; Conclusion 2, CR 158).

There were, of course, proper, non-negligent courses of conduct open to the Government in 1952.

Those charged with the preparation of its charts could have been informed that a surface-navigating vessel had struck a rock, and they could have been informed of the draft of such vessel.

It was, of course, possible for the Government to have made just such a survey after the CROCKER striking, as it ultimately did after the second striking by the ISLAND MAIL (as Captain Flint recommended—Ex. 11, 12, 14). Such a survey would have located the 3.5 Rock (in its original position) and it is reasonable to conclude that it would have been charted (to fail to do so would, itself, have been gross negligence), and that it would have been given a "wide berth" by the ISLAND MAIL.

It could have foregone a survey, and merely charted the position, as reported to it (2 miles, 281° T from Smith Island Light) or in such position as it might have determined that the striking occurred, with the officially designated symbol code for "Position Approximate" or "Position Doubtful" and it clearly could have, and should have, indicated a least depth over such rock, of something substantially less than the 20 fathoms indicated on the charts which it prepared, and required the ISLAND MAIL to have on board at the moment of the striking.

Any of such courses of action would have resulted in elimination of the misleading "Wreckage Rep." legend from the charts, and either accurate charting of the actual rock, or placement of a symbol indicating the approximate position of a danger to surface navigation by vessels having drafts of 20 or more feet, somewhere in the vicinity of the outer edge of the 10-fathom curve on the westerly side of Smith Island. This clearly would have sufficed to prevent the ISLAND MAIL casualty.

On the question of causation and proximate cause, the very recent case of *Schneider v. Yakima County,* 65 Wn.2d 333, 397 P.2d 411 (1965), is much in point.

This was a suit on behalf of passengers in an automobile injured when the car left the road on a sharp curve at high speed. Plaintiffs contended that the county's failure to place adequate warning signs warning of the curve was a proximate cause of the accident. At trial the jury returned a verdict for the plaintiffs.

Affirming, the Supreme Court of Washington said:

> "From this testimony, it can also be inferred that the signs posted did not convey an adequate warning of the situation ahead and that had there been any signs to indicate the urgent necessity to reduce speed, this accident would have been averted.
>
> This is far from conclusive proof of proximate cause, as must always be the case where the negligence relied upon is a failure to give adequate warning; but it clearly rises above speculation and conjecture to the level where reasonable minds can conclude that more likely than not adequate warnings would have prevented the accident which caused the injuries." (*Id.* at 415).

The court further pointed out that the fact that the driver's negligence may *also* have been a proximate cause of the accident would be no defense to the county, which was not entitled to have the driver's negligence imputed to the passengers.

Equally, in the present case, it is no defense to the Government, as respects the claim of Private Cargo, that Pilot Soriano may have been negligent—so long as reasonable men can fairly conclude that an adequate chart would more likely than not have prevented this accident.

B. Argument in support of specifications of error six through fourteen

Appellants have already set forth in this Brief the respects in which the Government was found to be negligent, "perhaps grossly so", by the District Court. The evidence further established that the Government was negligent in other respects, as to which the District Court made no specific finding. The District Court erroneously found that the "Wreckage Rep.—1952" legend placed on the charts in 1952 *was proper in view of the information then in possession of the Government and erred in describing the circle placed in association with it as a danger circle.*

It further erred in finding that the negligence of the Government was a failure "to formulate a plan for the coordination and dissemination of information." (FF 41, CR 159).

The authority and responsibility of the Coast Guard with respect to navigation, dangers thereto, and assistance to navigators, are prescribed by statute, Title 14, U.S.C. § 2, 81 (Extracted in Appendix 1). The authority and responsibility of the Coast and Geodetic Survey with respect to charts and navigational aids are prescribed in Title 33, U.S.C. § 883a (Appendix 1).

Aboard the ISLAND MAIL at the time of the casualty were current and corrected issues of the Charts Nos. 6380, 6450 and 6300, covering the casualty area, and published by the U. S. Coast and Geodetic Survey. The vessel was required by statute to have and maintain such charts 46 C.F.R. 97.05-1, -5 § 97.05-1, -5 (Appendix 1).

Under the statutes and regulations here in force, what duties were imposed on the two Government agencies most directly involved?

The following cases indicate the nature and scope of governmental duty and liability for negligence:

In *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), it was held that the Government would be liable if damage to a vessel and its cargo was caused by failure properly to maintain a light. The Court said:

> "* * * it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." (*Id.* at 64).

In *Pioneer Steamship Co. v. United States,* 176 F.Supp. 140 (E.D.Wis. 1959), the Government was held liable for damage to plaintiff's vessel caused by the Government's action in withdrawing previously posted warnings of dangers to navigation and thus holding out that an area was safe, when in fact it was not, and in failing to act upon reports received from other vessels which put it on notice that unsafe conditions persisted. As noted by the Court in that case, the Government was not responsible, in the first place, for the existence of the hazardous condition.

In *Everitt v. United States,* 204 F.Supp. 20 (S.D. Tex 1962), the Government was held liable for damage to a vessel arising from the Government's negligence in permitting a piling, part of a Government reference line, outside the channel, to remain in place after it was broken off below the water line.

Although, under the *Indian Towing* and other cited cases, the Government would be liable for negligent performance even as a volunteer, here the

Government is more. In the publication of information to mariners and the preparation of charts, it is performing Congressionally-authorized functions, and by requiring vessels to carry its charts, it invites, or more aptly, compels reliance on them. Private activity in the publication of nautical charts exists (*e.g.,* Ex. 105), but the Government has literally pre-empted the field by publication of its own charts, and the regulatory command that they be placed and maintained aboard ship.

In *The MARIA,* 91 F.2d 819 (4th Cir. 1937), the Court held that a vessel not provided with proper charts having current correction datum posted thereon was unseaworthy, and therefore liable to the owners of its cargo. Can the Government, which requires, as the sovereign, that vessels have and maintain Government-prepared charts, escape liability to cargo aboard a vessel being navigated in reliance on such charts negligently prepared? The cases indicate that it cannot.

Indian Towing and *Pioneer Steamship* were actions brought under the Federal Tort Claims Act. Private Cargo filed suits below under both the Tort Claims Act and the Suits in Admiralty Act, Title 46, U.S.C. §§ 741 *et seq.* (Extracted in Appendix 1). It is now clear that claims of the character here made are cognizable under the latter Act, as amended in 1960, and the District Court so held. (Conclusion 1, CR 160).

The Act provides in pertinent part:

> "Such suits shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . " (Title 46, U.S.C. § 743).

The waiver of immunity is complete, saving only

the reserved immunity from arrest of government property (*Id.,* § 741) and a limitation on the rate of interest which may be awarded (*Id.,* § 743).

The exceptions to the waiver of sovereign immunity provided by the Tort Claims Act are not repeated in the Suit in Admiralty Act. Thus, neither "agency discretion" nor "misrepresentation" affords a defense to the Government in this action, as might be the case under the Tort Claims Act. None of the provisions of the Tort Claims Act apply to claims "for which a remedy is provided by Sections 741-752 . . . of Title 46." (Title 28, U.S.C. § 2680(d)). In *United States v. Muniz,* 374 U. S. 150, 166 (1963), itself a Tort Claims Act case, the Court said:

> "We should not, at the same time that State Courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in Ravonier, Inc. v. United States, supra, (352 U.S. at 320), 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If that Act is to be altered that is the function for the same body that adopted it'."

Under the Suits in Admiralty Act, Congress has not itself narrowed the remedy provided generally by any exception of "agency discretion," and it is therefore irrelevant to liability here whether the fault of the Government was "a fault of the Government to formulate a plan for the coordination and dissemination of information." (FF 41, Tr. 159). Nevertheless, as will be seen, the evidence established that the faults of the Government were multiple, gross, and actionable.

Although presented under the Tort Claims Act,

the *Indian Towing* and *Pioneer Steamship* cases indicate conduct of the Government in relation to aids or obstructions to navigation which has been held to constitute actionable negligence.

In *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), the Supreme Court defined the duty of the United States with respect to lighthouse service in the following passage:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." (*Id.* at 69).

Pioneer Steamship Company v. United States, 176 F.Supp. 140 (E.D. Wis., 1959), was brought to recover for damages sustained by plaintiff's ship as a result of striking a submerged object near a Coast Guard Station at Racine Harbor on Lake Michigan, Wisconsin. At one time the area had been buoyed as a danger to navigation, but after dredging in conjunction with maintenance of the channel, the buoys marking the danger areas were removed and notice was issued by the Government in its official publications that the depth had been restored. Three vessels, thereafter, reported to the Coast Guard that they had "rubbed bottom." On the

basis of these reports, the Coast Guard made additional soundings and sweeping operations, but found no obstruction. Subsequently, plaintiff's ship ran heavily upon an obstruction. Following the casualty, the Coast Guard issued warnings to mariners to avoid the area until it could be cleared. Further sweepings and soundings were undertaken in the area and a number of objects, including stones and rock debris, channel iron and slabs of reinforced concrete were found. The court stated at pages 146 and 147:

> "While defendant did not create the hazardous condition by its own act, it undertook by acts of its agents and its contractors, performing nondelegable duties, to issue warnings in respect thereto and to effect its removal. Thereafter, defendant held out to mariners, including plaintiff, by its official publications and by rescinding its previously posted warnings in the area that the waters in the vicinity of the Coast Guard dock were free of illegal obstruction and navigable subject to stated depths.
>
> "Defendant failed to exercise due care in the performance of these acts. Defendant knew, or in the exercise of ordinary care should have known, that the removal of part of the debris by the Great Lakes Dredge & Dock Company did not clear the area in the vicinity of its dock of all debris. Subsequent sweepings and soundings revealed the continued presence thereof.
>
> * * *
>
> "When defendant received further notice of possible obstructions due to the debris remaining from the collapse of the Coast Guard dock in the area west of the slip by the information that vessels had rubbed bottom in that area which defendant held out to be navigable subject only to stated depths, it was put on inquiry

> notice whether or not it had failed in its previously assumed duties of removal, inspection, and warning. Thereafter, defendant did not do all things reasonable to assure that its holding out of navigability of the area, based on its attempted removal and rescinding of warning, did not constitute a trap to mariners. Defendant failed to exercise reasonable care when it did not ascertain the location of this possible hazard with any degree of certitude by further inquiry of the vessels in question and when it did not employ appropriate means to determine the potential existence thereof. See Eastern Transp. Co. v. United States, (D.C.E.D.Va.1928) 29 F.2d 588, affirmed The Snug Harbor, 4 Cir., 1930, 40 F.2d 27.

Measured against these standards, the Government was actionably negligent in the following respects in addition to those specifically found by the District Court:

1. *Search* (Specifications 6-8). Whether the Government had a statutory duty to search or did so as a mere volunteer, it undertook to do so and was thus obligated to conduct a proper and adequate search. Instead, it diverted, from another mission for a cursory 90-minute "exploration," a patrol boat not even equipped with a fathometer, and, if the vessel's log and the Government's Admission are binding on it, as we submit, (or entitled to credit in opposition to the recollection of its Boatswain twelve years after the event), its search was not even directed to the area where the CROCKER casualty had been reported. It is hardly surprising, therefore, that the results of the search were negative, although the 3.5 rock existed at a distance of only 790 feet west of the position reported by the CROCKER and was found when a proper search

was made in 1961. In this connection, *United States v. Gavagan,* 280 F.2d 319 (5th Cir., 1960) *cert. den.* 364 U.S. 933 (1961) is in point. There the Government was held liable, under the Tort Claims Act, for negligent conduct of Search and Rescue activities, since it had undertaken to perform them.

2. *The Government Induced Reliance on its Charts and They Were Affirmatively Misleading* (Specifications 9-12). No later than when pieces of rock were taken from the damaged hull of the CHARLES CROCKER, in the presence of a Coast Guard officer, between July 12 and 21, 1952, the Government, through the Coast Guard, knew that:

1. An uncharted rock existed in the waters west of Smith Island, in an area traveled by ships bound from Puget Sound for northern Washington, British Columbia and Alaska ports, or return.

2. The rock had been struck by, and had caused extensive damage to a vessel having a mean draft of 21 feet 11 inches.

3. Her Master reported the point of impact as two miles, 281° T from Smith Island Light—a point just outside the 10-fathom curve, but also reported fathometer readings indicating the vessel was inside the 10-fathom curve.

Promptly on receipt of telephone information that the CROCKER had struck an obstruction, the Coast Guard broadcast a radio Notice to Mariners which so informed them, and correctly stated the reported position (FF 29, Tr. 155). On July 5, 1952, however, the Government published its written Weekly Notice to Mariners, which did not inform the recipients that the reported object had been struck by a vessel, much less of the draft of such

vessel, and contained inaccurate coordinates for the position which had been reported to it.

Thereafter, the Coast and Geodetic Survey, which did not know the object described in the Weekly Notice had been struck by a vessel, or the draft of such vessel, and made no inquiries of any kind, endorsed the notation "Wreckage Rep.-1952" near a circle not centered at the position given by the vessel which had originated the report. The Chief of the Branch in charge of preparation of the charts, interpreted them, as so revised, to indicate a depth of 20 fathoms (120 feet) of water over the object.

The Government was chargeable in July, 1952 with knowledge that the object was a rock having not more than 17 feet 5 inches of water over its top at mean lower low water [MLLW], and although admittedly uncertain of the position of the object struck by the CROCKER, believed it to be inside the 10-fathom curve. Nevertheless, it published to mariners charts indicating Wreckage outside the 10-fathom curve at a point which was not that reported to it by the striking vessel. It did not use any of the numerous symbols prescribed in its own publication, Ex. 16, to indicate either a rock or wreckage or other obstruction which was known to be dangerous to surface navigation (0-5, 0-5a, 0-6a, 0-14, 0-15, 0-26 or 0-27) indicating instead that 20 fathoms of water were available in the area of the "Wreckage Rep." legend.

Further, it did not use its own prescribed abbreviations to indicate that the position given was approximate or doubtful (0-41, 0-42, Ex. 16).

Despite the Government's knowledge, neither the current charts of the area aboard the ISLAND

MAIL, nor the Coast Pilot, gave any indication of danger to surface navigation by a vessel having a deepest draft of 29 feet 2 inches, so long as it maintained a distance of not less than 1½ miles westerly of Smith Island Light.

3. *Government Negligence was not solely the result of lack of a plan for the coordination and dissemination of information amongst Government agencies.*

Commander Conway testified that an internal Coast Guard instruction required him to report to the Coast and Geodetic Survey, "if something isn't right." He knew the CROCKER had struck a rock. He knew of the published Notice to Mariners which referred to wreckage, but gave no notice that it had been struck by a surface vessel and gave a position which was outside the area in which he thought the casualty had occurred. Yet, he testified that: "I just let it sit there . . . there still may be a wreck there; I don't know." (Tr. 1062).

While failure "to formulate a plan for the coordination and dissemination of information," if a negligent failure, would be actionable under the Suits in Admiralty Act (if not the Tort Claims Act), other personal faults appear. For example, the Coast and Geodetic Survey never knew the depth of water over the object it charted as "Wreckage Rep.-1952," and never inquired. Its only knowledge came from the Weekly Notice which gave no information that a surface-navigating vessel had actually struck the object. We submit that the Weekly Notice was negligently prepared not only in stating a wrong position, but more importantly, in failing to set forth what was known to the Coast Guard, namely, that a surface vessel having a mean draft

of 21 feet 11 inches, had struck the object. We submit further that the Coast and Geodetic Survey was negligent in not making inquiry to determine whether additional information as to depth was available before placing the legend on the chart in a way which indicated that 20 fathoms of water was available.

C. Argument in support of specifications of error fifteen through eighteen

The District Court erred in finding that Pilot Soriano was negligent in his navigation of the ISLAND MAIL, and in finding that his negligence was the sole cause of the casualty.

If the Government was negligent in the respects specified by the District Court or in the other respects urged here, and such negligence was a proximate cause of the casualty and resultant damage to cargo, Private Cargo may recover from the Government, whether or not Pilot Soriano was also negligent. There is no basis for imputation of his negligence to the cargo interests, nor do we understand the Government to so contend. Thus, Soriano's negligence is irrelevant to this case, unless it were the *sole* proximate cause of the ISLAND MAIL casualty.

While the Government is critical of much of Soriano's navigation, and the District Court found him negligent "for the purpose of this case only" in failing "to check the position of the vessel and make an allowance for current" (FF 40, CR 158), such deficiencies, if established by the evidence, are material only if the ISLAND MAIL, at the time of the casualty, was, as a result of Soriano's negligence, in a position to which a prudent navigator

would not have taken her. Thus, the ultimate question, as to Soriano's negligence, is whether, in the light of information available to him on May 29, 1961, it was negligent to take the ISLAND MAIL over the position of the 3.5 rock, then unknown and uncharted.

The rock was 1.87 miles westerly of Smith Island Light (FF 17, CR 150), and 486.4 feet—about one ship length, inside the 10-fathom curve. The nearest soundings to the point of casualty were as follows (in fathoms, at MLLW): 6¼ (37′ plus), 6½ (39′), 14 (84′) and 11 (66′). The tide was plus 5 feet 4 inches. The vessel's maximum draft was 29 feet 2 inches. The charts indicated sufficient water for a vessel of such draft on such a tide to within about 0.6 miles westerly of the Light, although kelp was indicated as extending 1.5 miles west of the Light. The ISLAND MAIL never entered the kelp area.

The District Court did not find, and we do not understand the Government to contend, that it is always and everywhere negligent to navigate a vessel, drawing 29 feet 2 inches, in less than 10 fathoms (60 feet) of water. Pilot Soriano testified to numerous experiences in which he had taken vessels (including Government vessels) inside the 10-fathom curve at various points in pilotage waters (Tr. 55). So did other witnesses, including two called by the Government (Tr. 145, 373).

Precisely, what did the Government's own charts indicate as to safety of navigation by the ISLAND MAIL over the position where the 3.5 rock was later found, and is now charted?

Of the four soundings appearing on the chart in closest proximity to the position of the rock, the shallowest, east and north of the rock, was 6¼

fathoms, or 37.5 feet, at MLLW. At the then plus 5.4 foot stage of tide, the depth of water indicated was then 42.9 feet (Ex. 79A). In the preparation of its charts, the Coast and Geodetic Survey selects for placing on the chart, the least depth of water shown by its surveys for that area (Tr. 951-2). "Soundings are selected to best indicate the character of the bottom being charted, but in all cases the shoalest soundings are selected for the,—as a warning to the navigator." (Wennermark, CG Tr. 872). The same Government's witness who so testified, further testified that it would be safe for a vessel drawing 30 feet to pass through an area wire-dragged to 30 feet, under smooth sea conditions, on a plus five foot stage of the tide (CG Tr. 918-19).

The sounding nearest to the 3.5 rock which indicated less than 35 feet of water on a plus 5.4 foot tide was the 4¾ fathom sounding, 0.8 miles east and slightly north of the 3.5 rock, inside the kelp symbols, which themselves were over 0.4 miles inshore from the 3.5 rock where the ISLAND MAIL struck.

Thus, the charts showed adequate depths, and an absence of other dangers, for a distance of at least 0.4 miles inshore of the track of the ISLAND MAIL.

In these circumstances the fact that the area inside the 10-fathom curve was tinted on the charts does not support or justify the finding that it was negligence for Pilot Soriano to navigate the ISLAND MAIL on the extreme outer edge of the area, 1.87 miles west of the Smith Island Light.

The Government's own Nautical Chart Manuals, an extract of which is in evidence as Exhibit 126 and

127, destroy any basis for a finding that the 10-fathom curve is recognized as a danger curve by the Government, or should have been recognized as such by Pilot Soriano.

Exhibit 126 states, at page 46:

> "TINTS IN WATER AREAS.
> A blue tint is shown in water areas on an increasing number of printed charts to the curve which is considered the danger curve for that particular area.
> In general, the 6-foot curve shall be considered the danger curve for Intercoastal Waterway charts, the 12 or 18-foot curve for harbor charts, and the 30-foot [5-fathom] curve for coast and general charts."

Testifying with reference to the quoted statement, the Government's witness, Edmonston, conceded that the Government's manuals prescribed tinting to the 5-fathom curve on the charts in question (Tr. 943). He knew of no other definition or instruction issued by the Government with reference to tinting of charts (Tr. 942-43).

The Government's claim that tinting out to the 10-fathom curve constituted a warning of danger was, so far as appears, first made in this litigation. It had never disseminated information to that effect.

> "Q Mr. Edmonston, did—or do you know of any instructions or any information disseminated by the government whatsoever which states that the tinting out to a ten-fathom curve on any chart constitutes or characterizes that as a danger curve?
>
> A Specifically, no." (Tr. 944-45).

The testimony of another Government witness, Pilot Lindholm, in response to palpably leading questions by Government counsel, is illuminating.

"Q (By Mr. Fryer) Captain, on the charts as they existed and under conditions as they existed in 1961 are there any dangers that a pilot should be aware of to keep him outside the ten-fathom curve west of Smith Island?

A Well, there's really no known dangers. There was one circle outside the ten-fathom curve which was marked Wreckage Reported 1952.

* * *

Q What does the blue tint on the Chart 6450 for that area indicate to you?

A It indicates the ten-fathom area.

Q Does the blue tint indicate anything else to you?

MR. HOWARD: I object to that, your Honor. He has asked the question once and now he is leading his witness by asking for something else.

THE COURT: Overruled.

A The ten-fathom, I mean the blue area indicates a possible ten-fathom area." (Tr. 116-17).

Thus, the Government's first expert witness, boldly invited to say that the 10-fathom curve indicated a danger area, refused three times to so testify and stated instead: "Well, there's really no known dangers."

The District Court's finding was that the 10-fathom curve

> "... in that particular area is a definite warning of danger." (FF 15, Tr. 149.)

It will at once be conceded that there were dangers shown on the chart well within the 10-fathom curve —the kelp area extending west 1.5 miles from the

Light, and insufficient water inside 0.5 miles west of the Light (Ex. 79A). But no danger to surface navigation by vessels of the ISLAND MAIL's draft was indicated on the charts (or in the Coast Pilot) further than 1.5 miles west of Smith Island Light, until after the ISLAND MAIL casualty, and the District Court's finding that it was negligence to navigate the ISLAND MAIL on a track 1.87 miles west of the Light, and 486.4 feet inside the outer edge of such area, is unsupported by substantial evidence.

The second Government expert witness on the subject of piloting testified as follows:

> "Q What does the line, the ten-fathom curve itself, mean to you?
>
> * * *
>
> A Well, the ten-fathom curve means that the water inside of that towards the beach, it's ten fathoms there and as you go further in you get less water.
>
> Q (By Mr. Jones) Now, what more does the blue tint mean to you?
>
> A Well, the blue tint just calls your attention to the fact." (Tr. 273-4).

The District Court was also in error when, in Finding of Fact No. 11, it correctly found that the Kenyon calculator used by Pilot Soriano to take some of his bearings was inaccurate (because the bearing surface was "twenty or thirty thousandths" of an inch off the perpendicular), and that the center window of the pilot house, against which Soriano placed the calculator was off 1° from the perpendicular of the centerline of the vessel, but failed to recognize and find that these slight deviations from

the perpendicular corrected one another, thus producing substantial accuracy. Careful review of the testimony of Glen Warren, as to the grinding operation performed to correct the instrument, with the instrument itself (Ex. 43), discloses that, when pressed against the pilot house window, the slant of the bearing edge of the calculator would be counteracted by the slant of the window.

D. Argument on specification of errors eighteen and nineteen

The District Court erred in failing to find that, had information available to the Government been properly charted, the ISLAND MAIL would not have struck the 3.5 *rock. It erred in entering its Decree dismissing the libel, and in failing to enter a Decree adjudging the Government liable to Appellants and directing a determination as to Appellant's damages.*

The District Court's findings make it clear that its conclusory finding that the Government's negligence was not a proximate cause of the ISLAND MAIL casualty (FF 39, Conclusion 2; CR 158, 160) was, in the Court's view, compelled by its preceding finding that the CROCKER did not strike the 3.5 rock (FF 38, CR 157-8).

In its oral opinion, incorporated in the formal findings as FF 43 (CR 159) the Court stated (Tr. 1145):

> "In view of the fact, however, that the Court has determined that the steamship CHARLES CROCKER did not strike the 3.5 Rock the Court *must and does find* that any negligence upon the part of the Government in connection with the CROCKER incident was not a proximate cause

of the damage to the ISLAND MAIL's cargo. Any other conclusion must rest on speculation." [Emphasis supplied]

Appellants have demonstrated, *supra,* that the evidence on that issue requires a finding that the CROCKER did in fact strike the 3.5 rock, and that evidence destroys the basis for the District Court's holding that Government negligence was not a proximate cause of the ISLAND MAIL casualty.

Thus, the issue is whether, if the Government's charts and publications had given proper notice of a danger to surface navigation, either at the precise location of the 3.5 rock, or on the outer perimeter of the 10-fathom curve west of Smith Island, the ISLAND MAIL would have struck the 3.5 rock.

There is, of course, no evidence, or permissible inference therefrom, that, had the rock itself been located and charted prior to the ISLAND MAIL casualty, the ISLAND MAIL would have struck it.

The obvious purpose of the placement of such a warning on the charts (and/or publication in the Coast Pilot) is to alert navigators to such dangers, so that they may keep clear of them. That is precisely why the post-ISLAND MAIL charts and the now current Coast Pilot give clear notice of the existence, location, and depth of the 3.5 rock. It would seem capricious for the Government to suggest that Pilot Soriano, Captain Smith and Mate Gunderson, all tested and licensed by the Government itself, would have navigated the ISLAND MAIL into collision with a charted rock.

Similarly, although a reasonable search in 1952 would have disclosed the existence, location and depth of the 3.5 rock (as it did in 1961) even if the

Government was not under a duty to conduct a reasonable search following the CROCKER casualty, it was, beyond possible dispute, under a duty to give a proper warning of danger based on the information which it did have—briefly:

(1) that a vessel having a deepest draft of 24 feet 2 inches had struck a rock

(2) at a position given by her Master as 2 miles, 281° T from Smith Island Light

(3) but that its fathometer readings indicated a passage somewhat closer to the Light, and

(4) proper plotting of information obtained by the Coast Guard from the CROCKER's helmsman and watch officer would place the casualty at about 1.75 miles off the Light.

Had such information been placed on the charts (and/or been set forth in the Coast Pilot) in one of the several ways prescribed by the Government itself in Ex. 16, with the notation "Position Approximate" or "Position Doubtful" anywhere within the area bracketed by the information as to the rock's location, would the ISLAND MAIL have come into contact with the rock?

It must be remembered that the 3.5 rock is 1.87 miles west of Smith Island Light—and thus 0.12 miles (or 729 feet) west of the CROCKER's track as indicated to the Coast Guard by her helmsman and mate, and .13 miles (or 790 feet) east of the CROCKER's track, as reported by her Master. Any reasonable positioning of a danger symbol to give the approximate position of the rock struck by the CROCKER would have been in the immediate area where the 3.5 rock was subsequently struck by the

ISLAND MAIL (and later charted precisely), and would have shown a depth of less than three fathoms over its top.

The testimony was that a prudent navigator would have given a "wide berth" to any such symbol.

Pilot Soriano testified that it was his practice, in piloting such vessels as the ISLAND MAIL west of Smith Island to navigate at a minimum of ½ mile distance from any known or reported danger to surface navigation of vessels of such draft (Tr. 491-2). Objection was made by the Government, and sustained by the District Court, when Soriano was asked specifically how he would have shaped the course and track of the ISLAND MAIL, if one of the danger symbols prescribed by Ex. 16 had been placed on the chart, or a warning had been given in the Coast Pilot (Tr. 481-3).

Mate Gunderson testified that he would have called the Master if in doubt as to the safety of the vessel's position, (or if in immediate danger would have relieved the pilot himself) (CG Tr. 308). Gunderson, who was intermittently observing the vessel's charts in the chart room (CG Tr. 314), never had any doubt that the ISLAND MAIL was in safe water (CG Tr. 290, 308).

Captain Floyd Smith, a licensed Puget Sound pilot, testified, in answer to questions from Government counsel, that a reasonably prudent pilot would direct his vessel's course to pass such danger symbols at a distance of ¼ to ½ mile, *and if the chart indicated "position approximate" or "position doubtful,"* he would pass at a greater distance. (Tr. 868-69).

There was no testimony whatever that a prudent pilot would have directed the course of his vessel

in such proximity to any danger symbol adequately representing the approximate position and depth of the rock struck by the CROCKER (based solely on what the Government knew in July, 1952) that the ISLAND MAIL could have struck the 3.5 rock in 1961.

As the Supreme Court of Washington recognized in *Schneider v. Yakima County,* 65 Wn.2d 333, 397 P.2d 411 (1965), where the negligence involved is failure to give an adequate warning, proof that no warning was given, or that it was inadequate justifies the inference that the accident would have been averted by a proper warning. Here the testimony is undisputed that the ISLAND MAIL would not have been navigated on a track 1.87 miles west of Smith Island Light, and the casualty would not have occurred, had adequate warning been given. The District Court erred in not finding and concluding that the Government's negligence was a proximate cause of the ISLAND MAIL casualty and resultant damage, and in not entering an Interlocutory Decree, with a reference for damages, in favor of Appellant-Libelants below.

V. CONCLUSION

The District Court characterized this consolidated litigation as "the Case of the Disappearing Rock" or "The Case of the Ship That Struck the Rock That Wasn't There" (Tr. 1129) and appellants respectfully submit that the decision below can be affirmed only if this Court can believe that rocks disappear, or that ships strike non-existent rocks, because that is, in final analysis, what the District Court held.

The District Court was led into such error, although it found Appellant's contention to be the "most probable possibility" (Tr. 1138), because it misconceived the force and function of circumstantial evidence in cases such as this in which, by their nature, direct eye-witness testimony of subsurface happenings is unavailable. Appellant's evidence was of that character described by the Court of Appeals for the Fourth Circuit in *Whorton v. Loving,* 344 F.2d 739, 742 (1965), as "amply sufficient to create and support the inference" of a subsurface happening, and here, as there, the inference is "inescapable."

Not only did the evidence establish Appellant's contention by a preponderance of the evidence, which is all that is required, (*Fegles v. McLaughlin,* 205 F.2d 637 (9th Cir. 1953), but here, as in the *Fegles* case, it "excludes every other *reasonable hypothesis.*"

The case should be remanded with directions to enter an Interlocutory Decree as to liability in favor of Appellants, and for further proceedings on the issue of damages.

VI. SUPPLEMENTAL STATEMENT OF THE CASE

Additional facts pertinent to Private Cargo's appeal against American Mail Line

Prior to departure of the ISLAND MAIL from Seattle on May 29, 1961, Private Cargo had delivered to appellee MAIL LINE, and there had been loaded aboard the vessel, goods and merchandise in good order and condition, for carriage to various ports in the Orient. Carriage of the cargo was subject to the familiar Carriage of Goods By Sea Act, Title 46 U.S.C. § 1300, *et seq.* and, subject thereto, to the

bills of lading, of which Ex. 94 is an example. Some of said cargo was damaged, and not delivered in the same good order and condition as when received (FF 17, Tr. 235).

All issues as to damages were reserved for later trial, and the proceedings below were directed only to liability (Docket No. 16733, Entry of Sept. 23, 1962, CR 5).

Prior to December 27, 1960, the ISLAND MAIL's fathometer had become inoperable. The fact that it was inoperable at the time of the vessel's departure from Seattle on May 29, 1961, was known to managing officials of American Mail Line, Ltd., as well as to officials of the U. S. Coast Guard and the Maritime Administration. An unrestricted Certificate of Inspection had been issued with knowledge that its fathometer had been disconnected (FF 9, Tr. 232).

However, in view of the District Court's finding that the 10-fathom curve was a definite warning of danger, Private Cargo maintains that in sending the ISLAND MAIL to sea with its fathometer inoperable, MAIL LINE failed to exercise due diligence to make the vessel seaworthy, that it was in fact unseaworthy by reason of the absence of a functioning fathometer, and that such unseaworthy condition was a proximate cause of the casualty, and resultant damage to Private Cargo.

The District Court found and concluded that the vessel was not unseaworthy because of the absence of a fathometer, and that its absence "had nothing to do" with the casualty (FF 8, Tr. 231) and that MAIL LINE had exercised due diligence to make the ISLAND MAIL seaworthy (FF 21, Tr. 236) (Conclusion 4, Tr. 237).

The Use and Function of a Fathometer.

The ISLAND MAIL was equipped with numerous navigational devices, including radar, but her fathometer (echo sounding device) was completely inoperative. This fact was known to her owners and operators, to the Government, but not to the shippers, consignees, owners or others concerned in the privately-owned cargo. Thus at the time of this incident the only means of determining the actual depth of water beneath the vessel's keel was by hand sounding with a lead line or through the use of her so-called mechanical sounding machine. Neither of these devices was capable of giving continuous readings of the depth of the water as the vessel proceeded at full speed. (See Exhibit 55, Bowditch, "Practical Navigator" § 618). See also, Knight's "Modern Seamanship" pp. 90-91, (13th Ed.).

A fathometer is usual and customary equipment aboard ocean-going vessels. It gives continuous readings of the depth of the water under the keel while the vessel is at full speed and these readings are presented both on a dial and on a graph on the bridge where they can be easily and continuously observed by the navigating personnel. As stated by Bowditch, most soundings are now made by means of a fathometer (echo sounder) (Ex. 55, § 618).

The District Court found that the 10-fathom curve in the region west of Smith Island was "a definite warning of danger" (FF 15, Tr. 149). The "act, neglect or default" of Pilot Soriano was in permitting a vessel of the draft of the ISLAND MAIL to penetrate that line, within which, presumably, all waters are less than 60 feet deep (FF 12, Tr. 233). Thus, in both Private Cargo's action

against the United States, and in its claims against Mail Line in the limitation proceeding, faced with the parties' stipulation that the ISLAND MAIL struck a rock (the "3.5 rock") just inside the 10-fathom curve, the District Court attributed the casualty to the pilot's negligence in taking her there. It was possible, of course, to determine the vessel's position with respect to Smith Island Light by radar, or by means of cross-bearings and to lay down that position on a chart and thus determine whether the vessel was within or without the 10-fathom curve as shown on the then existing charts. Even without taking into consideration the fact that the charts of the area as they existed in 1961 have since been shown to be less than perfect,[16] it is manifest that these alternate methods of determining the vessel's position relative to the 10-fathom curve are inferior to a fathometer which provides automatic and continuous readings of the depth of water under the keel.

The trial of this case was largely concerned with the methods employed and which might have been employed to fix the positions of the ISLAND MAIL from time to time. The end goal of all such methods was to determine whether the ISLAND MAIL was in safe waters. There can be no doubt that the vessel's fathometer would have done this surely and accurately, had it been operative.

The ISLAND MAIL'S Chief Officer White testified that an adequate fathometer would have "picked up" the shoal to the westward of Smith Island, if it had been in use (CG Tr. 233).

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16. For example, in charting the position of the object struck by the CROCKER, as reported to the Coast Guard the Coast and Geodetic Survey centered the symbol over 700 feet from the coordinates of the reported position.

Promptly upon his assignment to the ISLAND MAIL, the vessel's navigator, Mate Gunderson, observed that the fathometer was inoperable and made a request to have it repaired (Ex. 139, p. 327).

Captain Andreas Einmo, a licensed Puget Sound pilot, called as an expert witness by the Government (Tr. 351-2) testified not only that the fathometer would detect passage of a vessel over the 10-fathom curve, but (in response to a question by the Court) that he would use the fathometer as a check on the accuracy of his bearings to locate the position of the vessel (Tr. 365). Indeed, Captain Soriano himself testified to his use of the fathometer aboard another vessel to pick up the soundings when navigating across the 10-fathom curve in the Dallas Bank area, a few miles west of Smith Island.

Furthermore, Mr. Edmonston testified that one function of the depth curves appearing on charts published by the Coast and Geodetic Survey (with which the ISLAND MAIL was provided) was to afford navigators an additional feature with which to fix the position of the vessel, by use of the fathometer (Tr. 951).

The evidence establishes, without contradiction, that the fathometer would have shown that the vessel was penetrating the 10-fathom curve, which "in that particular area is a definite warning of danger" (FF 43, Oral Opinion, Tr. 1139). Thus the fathometer becomes crucial. A fathometer would not detect an isolated rock in time to avoid it, but it would easily, quickly and surely detect penetration of the 10-fathom curve.

Failure to maintain an operable navigational aid which, if available, would have instantaneously informed those charged with the navigation that the

vessel had entered waters that the District Court found to be dangerous, is clearly unseaworthiness.

The issue is not whether the fathometer would have detected the rock but whether it would have detected penetration of the 10-fathom curve, which it clearly would have done more quickly and efficiently than any of the other equipment on board.

VII

SPECIFICATION OF ERRORS

1. The District Court erred in finding that upon departure from Seattle on May 29, 1961, the ISLAND MAIL was in all respects seaworthy, and was not unseaworthy because of the condition of the fathometer, and in failing to find that the ISLAND MAIL was unseaworthy by reason of her inoperative fathometer. (FF 8, CR 231).

2. The District Court erred in finding and concluding that American Mail Line Ltd. exercised due diligence to make the ISLAND MAIL seaworthy and properly manned, equipped and supplied, and in concluding that her grounding, and resultant loss, damage and injury were done, occasioned or incurred without the privity or knowledge and without fault or liability of American Mail Line Ltd. (FF 21, CR 236).

3. The District Court erred in failing to find that if the fathometer on board the ISLAND MAIL had been operable and in use it would have given warning to the pilot and to the mate on watch, as well as to the vessel's other officers when the ISLAND MAIL crossed the 10-fathom curve, which, according to the District Court, was a definite warning of danger in the area around Smith Island.

4. The District Court erred in finding that the inoperable condition of the fathometer aboard the ISLAND MAIL had nothing to do with the striking of an uncharted rock within the 10-fathom curve, and in failing to find that an operable fathometer could have prevented the casualty. (FF 8, CR 231).

5. The District Court erred in failing to find that there was no proof that the fathometer aboard the ISLAND MAIL would not have been used by the vessel's officers if it had been operable and in finding that its use under conditions then existing was unnecessary. (FF 8, CR 231).

6. The District Court erred in finding that the vessel's striking of a rock inside the 10-fathom curve was occasioned by the pilot's failure to fix her position accurately with the means at hand and in failing to find that the inoperability of the fathometer, an instrument that would automatically and continuously give warning of penetration of the 10-fathom curve, rendered the ISLAND MAIL unseaworthy and contributed to the loss. (FF 12, CR 233).

7. The District Court erred in entering a decree dismissing the claims and causes of action of the cargo claimants-appellants herein and in failing to enter a decree that petitioner-appellee, American Mail Line Ltd. was liable in damages to appellants.

VIII. ARGUMENT

American Mail Line breached its statutory duty to exercise due diligence to make the carrying vessel seaworthy, and to properly equip her as required by Title 46, U.S.C. § 1303 (1). It offered no evidence to prove exercise of due diligence, the burden of doing

so being placed upon her, as carrier, by Title 46, U.S.C. § 1304 (1). Mail Line's managers had knowledge that the ISLAND MAIL'S fathometer was inoperable. No attempt to show due diligence was, or could have been made.

It is clear that the exceptions of error in navigation and peril of the seas afforded by Section 1304 (2) of the Carriage Of Goods By Sea Act and which the District Court found excused MAIL LINE in this case, are not available to the carrier if it has failed to prove that it exercised due diligence to provide a seaworthy vessel. *Schroeder Bros. v. The SATURNIA,* 123 F.Supp. 282 (S.D.N.Y. 1954), *aff'd,* 226 F.2d 147 (2d Cir., 1955). *General Motors Co. v. The OLANCHO,* 115 F.Supp. 107 (S.D.N.Y. 1953), *aff'd,* 220 F.2d 278 (2d Cir. 1955) (per curiam).

Indeed, if damage to cargo results in part from a cause for which the carrier is liable, and in part from an excepted cause, the carrier bears the entire loss, unless it can segregate. *Schnell v. The VALLESCURA,* 293 U.S. 296 (1934). To the carrier's statutory exemptions ". . . the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it." (*Id.* at 304).

Can it be said that a carrier knowingly sending its vessel to sea with an inoperable fathometer, has used due care to guard against what the District Court here found to be negligent penetration of the 10-fathom curve, a "definite warning of danger"?

And when the vessel strikes an uncharted obstruction within that "danger area" can the carrier be excused because proper use of other equipment

available aboard the vessel might have averted the casualty?

The District Court answered these questions in the affirmative.

We submit that the law is to the contrary.

From the evidence outlined above, it necessarily follows that the ISLAND MAIL'S transgression of the 10-fathom curve off Smith Island would have been detected by her fathometer had it been operative. Furthermore, it is clear that the information thus obtained and made available to the vessel's navigators should have constituted a warning of the vessel's entry into an area of imminent peril. However, being without an operative fathometer when she departed from Seattle, the ISLAND MAIL was deprived of the most accurate means of determining its position with relation to the 10-fathom curve, the penetration of which the District Court found to be negligence.

The failure to have a vessel's fathometer in operable condition renders it unseaworthy. *Indian Towing Company v. United States,* 182 F.Supp. 264 (E.D.La. 1959), *aff'd,* 276 F.2d 300 (5th Cir.), *cert. den'd,* 364 U.S. 821 (1960). In the *Indian Towing Company* case, the trial court held that the unseaworthiness of a tug, the NAVAJO, proximately caused the grounding of the barge it was towing. One of the factors upon which the tug's unseaworthiness was predicated was the inoperative condition of its fathometer, concerning which the court stated:

> "With an inoperative fathometer, the Navajo could determine the depth of the water only by taking soundings with a hand lead line. These, to be accurate and reliable, must be taken, at dead slow speed, * * * " 182 F.Supp. 264, at 267.

So holding, the court held shipowner not entitled to recover for loss of cargo or vessel.

The holding in *Indian Towing Company* is consistent with the principle that a shipowner is obligated to adopt modern navigational equipment in order to maintain a seaworthy vessel. Thus, in *The T. J. Hooper,* 53 F.2d 107 (S.D.N.Y. 1931) the court stated:

> "The standard of seaworthiness is not, however, dependent on statutory enactment, or condemned to inertia or rigidity, but changes 'with advancing knowledge, experience, and the changed appliances of navigation.' The Titania (D.C.) 19 F. 101, 106; The Southwark, 191 U.S. 1, 24 S.Ct. 1, 48 L.Ed. 65. It is particularly affected by new devices of demonstrated worth, which have become recognized as regular equipment by common usage." (*Id.* at 111).

Upon the evidence here, if the ISLAND MAIL had not been equipped with an echo-sounding fathometer, the vessel would have been unseaworthy. More importantly, once the fathometer was installed on the vessel, it becomes even clearer that the Mail Line was obliged to keep that equipment in operating condition if the ISLAND MAIL were to remain seaworthy. This is the rule announced in *Indian Towing Company v. United States,* (*supra*). Furthermore, it does not differ from other cases holding that vessels going to sea with defective navigational equipment are unseaworthy. In *The MARIA,* 91 F.2d 819 (4th Cir., 1937), a vessel was found unseaworthy when she sailed with outdated navigational publications.

There the court said:

> "Our view of the law, now that the point has been definitely raised, is that charts, light lists,

> and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them. * * * The duty of an owner in this respect is nondelegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship. [Citations] * * *" (*Id.* at 824).

Similarly, a vessel was held to be unseaworthy, if, although equipped with a proper compass she should put to sea with that item of navigational equipment in a defective condition. *Greater New Orleans Expressway Commission v. The Tug Claribel,* 222 F.Supp. 521 (E.D.La. 1963), 1964 AMC 967; *OVERBROOK,* 1932 A.M.C. 719 (S.D.N.Y. 1931). We submit that the ISLAND MAIL upon departing Seattle with an inoperable fathometer was deprived of a useful navigational device, and that in such condition there can be no doubt that she was rendered unseaworthy.

IX. CONCLUSION

If the 10-fathom curve was "a definite warning of danger" in the area west of Smith Island, and its penetration was negligence, the absence of any means for ready determination of depths while the vessel was underway becomes a clear cause of the casualty and resultant damage, for which the carrier is liable.

In such event, the decree must be reversed, with

directions to enter a decree adjudging MAIL LINE liable for damage to Private Cargo, and for further proceedings on the issue of damages.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

MARTIN P. DETELS, JR.
Attorney for Appelants

Appendix 1—Statutes and Regulations

Appendix 2—Exhibit 14—Letter Report of Captain Flint

Appendix 3—Plot of CROCKER positions per Flint

Appendix 4—Plot of CROCKER positions per Conway

Appendix 5—Graphic Presentation—ISLAND MAIL, CROCKER and 3.5 Rock

Appendix 6—Table of Exhibits

APPENDIX 1

STATUTES AND REGULATIONS

United States Code

TITLE 14

§ 2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war. As amended Oct. 5, 1961, Pub.L. 87-396, § 1, 75 Stat. 827.

§ 81. Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve

the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the Department of Defense; and

(3) Loran stations (a) required to serve the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of the Federal Aviation Agency.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948. As amended Aug. 23, 1958, Pub.L. 85-726, Title XIV § 1404, 72 Stat. 808.

TITLE 28

§ 2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

* * *

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to

claims or suits in admiralty against the United States.

TITLE 33

§ 883a. Surveys and other activities

To provide charts and related information for the safe navigation of marine and air commerce, and to provide basic data for engineering and scientific purposes and for other commercial and industrial needs, the Director of the Coast and Geodetic Survey, hereinafter referred to as the Director, under direction of the Secretary of Commerce, is authorized to conduct the following activities:

(1) Hydrographic and topographic surveys;

(2) Tide and current observations;

(3) Geodetic-control surveys;

(4) Field surveys for aeronautical charts;

(5) Geomagnetic, seismological, gravity, and related geophysical measurements and investigations, and observations for the determination of variation in latitude and longitude. As amended Apr. 5, 1960, Pub.L. 86-409, 74 Stat. 16.

TITLE 46

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. . . . As amended Sept. 13, 1960, Pub.L. 86-770, § 3, 74 Stat. 912.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. . . . Mar. 9, 1920, c. 95 § 3, 41 Stat. 526.

TITLE 46

§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter. Apr. 16, 1936, c 229, 49 Stat. 1207.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title. Apr. 16, 1936, c 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilties and liabilities of carrier and ship—Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to-

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception,

carriage, and preservation. . . . Apr. 16, 1936, c 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship —Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; . . . (c) Perils, dangers, and accidents of the sea or other navigable waters; . . . Apr. 16, 1936, c 229, § 4, 49 Stat. 1210.

CODE OF FEDERAL REGULATIONS

Subpart 97.05—Notice to Mariners and Aids to Navigation

§ 97.05-1. Duty of officers

(a) Licensed deck officers are required to ac-

quaint themselves with the latest information published by the Coast Guard and the United States Navy regarding aids to navigation. Neglect to do so is evidence of neglect of duty. It is desirable that vessels other than motorboats shall have available in the pilot house for convenient reference at all times a file of the applicable Notice to Mariners.

(1) Notice to Mariners, published weekly by the Coast Guard, contains announcements and information regarding aids to navigation and charts of waters of the United States and is available for free distribution at field offices of the Coast Guard, United States Coast and Geodetic Survey field stations, and the Marine Division, Custom House.

(2) Notice to Mariners, published weekly by the United States Navy for the correction of charts, sailing directions, light lists, and other publications, and which includes foreign waters and certain waters of the United States, is available for free distribution at the Hydrographic Office, Branch Hydrographic Offices, or any of the agencies of seaboard ports, and is also on file in the United States consulates where they may be inspected.

§ 97.05-5. Charts

(a) All vessels, except barges, vessels operating exclusively on rivers, and mortorboats other than those certificated for ocean and coastwise routes, shall have charts of the waters upon which they operate available for convenient reference at all times. (CGFR 55-28, 20 F. R. 4461, June 25, 1955).

APPENDIX 2

COASTWISE LINE
CALIFORNIA - OREGON - WASHINGTON - ALASKA
150 SANSOME STREET
SAN FRANCISCO 4, CALIFORNIA

SS 'Charles Crocker'
July 7, 1952

Officer in Charge Marine Inspection
United States Coast Guard
Portland, Oregon.

Dear Sir:

In addition to original and two copies of form 2692 submitted herewith I am giving you the following report on striking an unknown obstruction with this vessel at 1406 Pacific Daylight Saving Time on June 18, 1952 while on a voyage from Seattle, Wash. to Seward and other Southwestern Alaska ports.

In proceeding North via Rosario Strait I passed to the Westward of Smith Island and to the Eastward of the Naval Operations Area located South and East of Hein Bank as this area is closed to shipping from 8 A.M. to 4 P.M. Pacific Standard Time. It is no longer possible to pass East of Smith Island as we formerly did due to this area being closed to shipping at all times by the U.S. Navy.

Smith Island Lighthouse was abeam at 1401 D.S.T. Although the logbook entry places vessel 2.2 miles off, cross bearing taken shortly after placed her an even two miles off. When the lighthouse was abeam I began hauling very slowly to the right, keeping the lighthouse abeam in order to preserve the original distance off until vessel came around to her next course of 39 degrees true. At the same time I had the second mate Mr. Burris start the Fathometer

and keep me informed on the soundings he obtained. The soundings registered by this machine are from the keel to the bottom and started at nine fathoms, shoaled to six, remaining at six until 1406 when it suddenly registered three and one half fathoms under the keel. As this was reported I ordered the wheel hard left but just as the man at the wheel had it hard over a heavy jar was felt, apparently on the starboard side abreast number four hatch, and vessel which was rather tender due to a large deckload took a roll to port. She did not lose headway. Engine was stopped at once. The fathometer then registered seven fathoms under the keel and at 1408 registered nine fathoms. Engine was then put slow ahead and two minutes later full ahead proceeding toward Rosario Strait, having Smith Island Lighthouse abeam the second time 2.2 miles off at 1416 on a course of 42 degrees true.

It was high water at Smith Island at 1602 D.S.T., height 5.5 feet. The height at 1406 was 4.5 feet. Vessel was drawing 19′ 8″ forward, 24′ 02″ aft, 21′ 11″ mean, or 21 feet at the Fathometer transmitting oscillator which is located just to starboard of the keel between frames 66 and 67. This gives the following chain of soundings reduced to Mean Lower Low Water which is the latest soundings shown on the chart.

Time	1402	1405	1406	1407	1406
	fath.	fath.	fath.	fath.	fath.
Fathometer registered	9	6	3½	7	9
Depth of oscillator (21′) plus	3½	3½	3½	3½	3½
Actual depth of water	12½	9½	7	10½	12½
Height of tide at 1406 (4.5′)	—¾	—¾	—¾	—¾	—¾
Sounding at mean lower low water	11¾	8¾	6½	9¾	11¾

Although no cross bearings were obtained at the

exact time of striking, a fix was obtained one minute before when Iceberg Point Light was right ahead on a bearing of 360 degrees true and Smith Island Lighthouse was abeam to starboard on a bearing of 90 degrees true.

Just what it was the the vessel struck I do not know. Whatever it may be it is of very small extent, either submerged wreckage, possibly a sunken target from the nearby Naval Operations Area, or a pinnacle rock. Undoubtedly a few feet one side or the other would have cleared it entirely.

In view of the fact we are not allowed to use the former route East of Smith Island as it closed to navigation by the Navy, all vessels bound to or from Rosario Strait, Anacortes, Bellingham and Blaine must of necessity run to the Westward of Smith Island. I have observed other vessels passing much closer than two miles off Smith Island, in fact I met a tug and barge bound South some fifteen minutes before striking that was about half a mile East of the vessel. The following notice to mariners was broadcast the next morning as the result of my radio report of the incident.

QUOTE:

JUNE 19, 1952

TTT MW U S COAST GUARD SEATTLE

INFORMATION TO ALL SHIPPING—NOTICE TO MARINERS NUMBER R100-WASHINGTON STRAIT OF JUAN DE FUCA SS CHARLES CROCKER ADVISES STRUCK OBSTRUCTION ON 18 JUNE IN POSITION 2 MILES 281 DE-

GREES TRUE FROM SMITH ISLAND LIGHT. REFER LIGHT LIST NUMBER 1757.

COMMANDER 13TH COAST GUARD DISTRICT
END OF QUOTE.

I am sure it would be greatly appreciated by all mariners if you could cause this area to be carefully examined and this uncharted danger located and buoyed for the protection of shipping.

Yours respectfully,

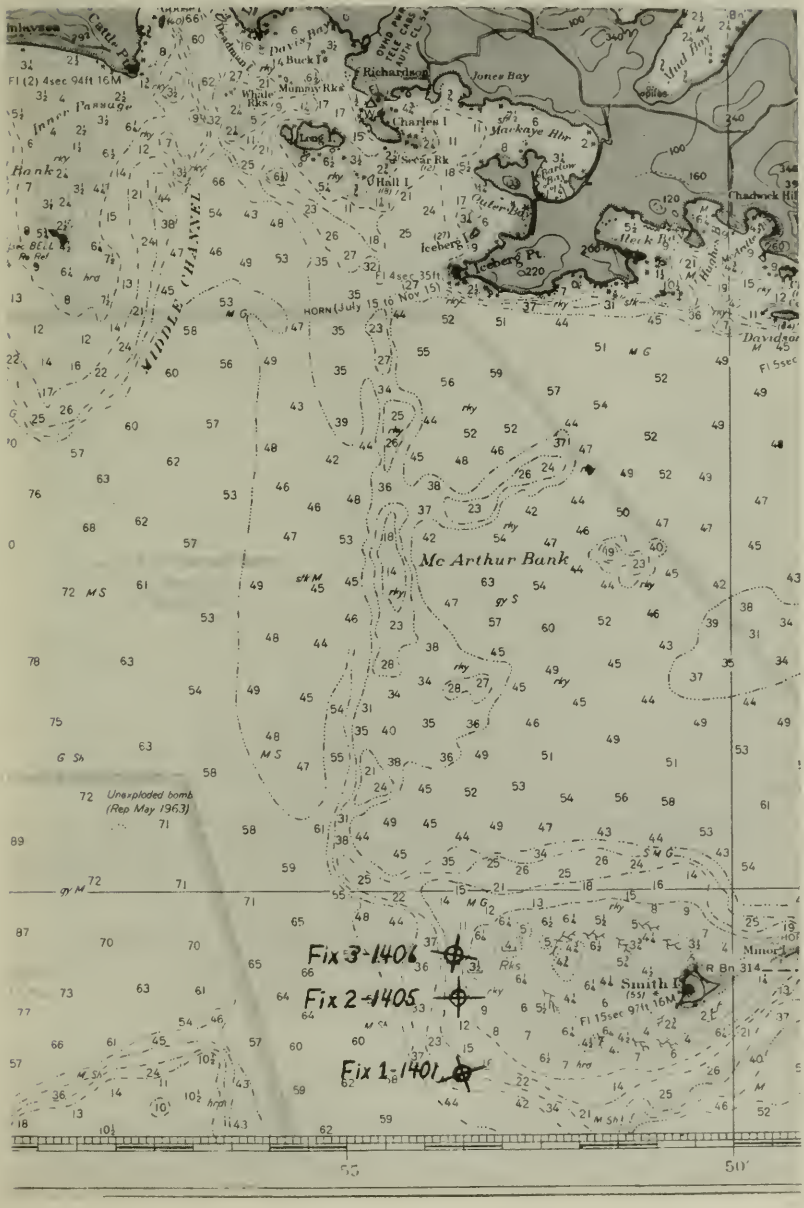
D. G. Flint

Master and Pilot, S.S. Charles Crocker

A11

APPENDIX 3

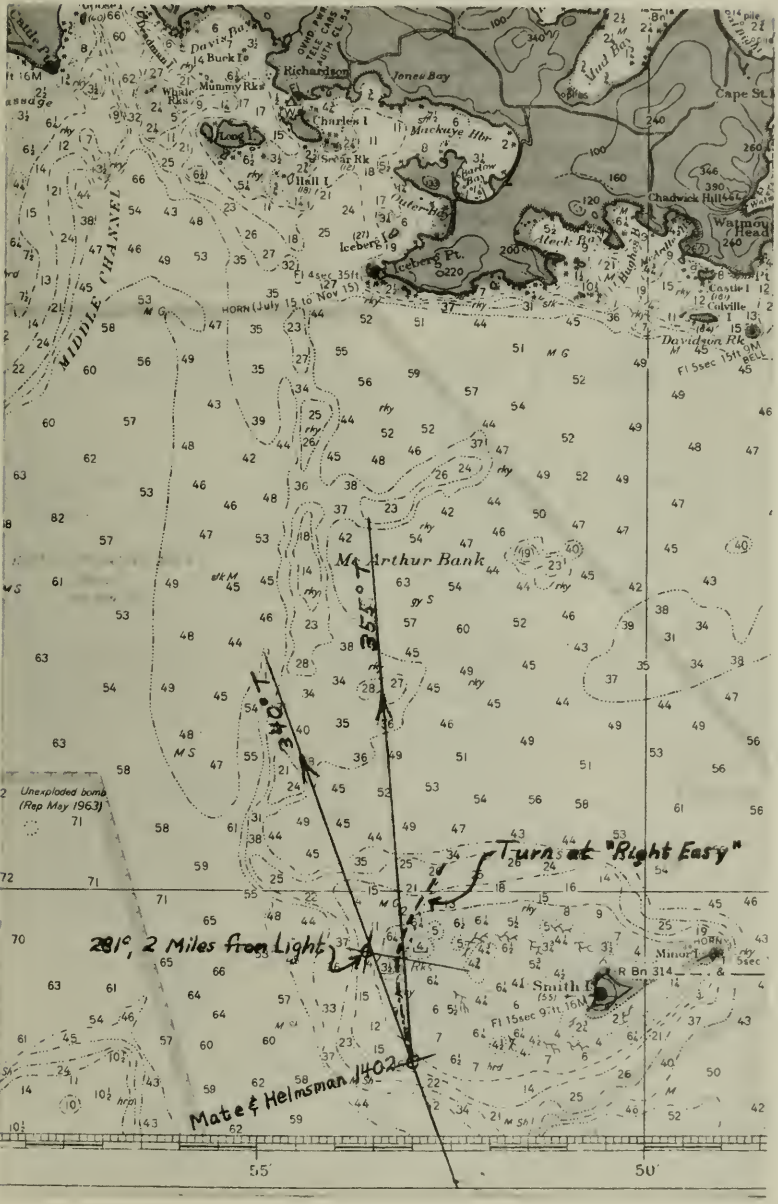
Plot of CROCKER Positions per Flint
(Exerpt from U.S.C. & G.S. Chart 6380)



A13

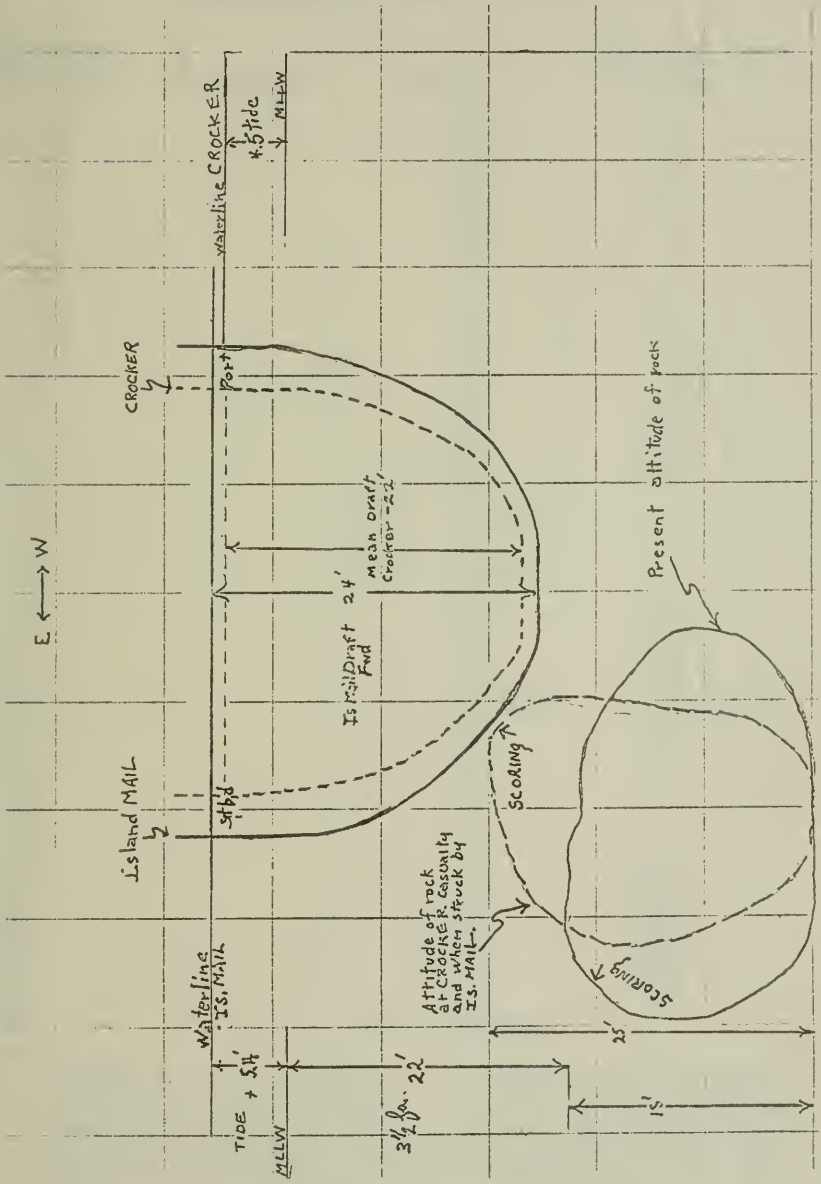
APPENDIX 4

Plot of CROCKER Positions per Conway
(Excerpt from U.S.C. & G.S. Chart 6380)



APPENDIX 5

Graphic Presentation—
Island Mail, Crocker and 3.5 Rock



APPENDIX 6

TABLE OF EXHIBITS

(Page References to Transcript)

Exhibit Number	Identified	Offered	Received or Rejected
1	[1]	12	13
2	.....	12	13
3	.....	395	395
4	.....	12	13
5	.....	12	13
6	.....	.....	.....
7	.....	12	13
8	.....	12	13
9	.....	12	13
10	.....	12	13
11	.....	657	657
12	.....	657	657
13	.....	Not Offered	
14	.....	12	13
15	.....	Not Offered	
16	.....	131	131
17	.....	19	19
18	.....	612	612
19	.....	12, 619	13, 619
19B	.....	617	617
20	.....	12	13
21	.....	12	13
22	.....	12	13
23	.....	12	13
24	.....	895	895
25	.....	895	895
26	.....	895	895
27	.....	12	13
28	.....	Not Offered	

1. Exhibits 1 to 125 (except 40A and 79A) were indentified in the Exhibit List, CR 96-105. Exhibits 126 and 127 were identified as Additional Exhibits, CR 111. Exhibits 128 to 130 were identified as Additional Exhibits, CR 112. Exhibit 131 was identified as an Additional Exhibit, CR 113.

Exhibit Number	Identified	Offered	Received or Rejected
29	.....	12	13
30	.....	396	396
31	.....	396	396
32	.....	12	13
33	.....	Not Offered	
34	.....	Not Offered	
35	.....	Not Offered	
36	.....	12	13
37	.....	12	13
38	.....	896	896
39	.....	896	896
40	.....	12	13
40A	668	668	668
41	.....	12	13
42	.....	Not Offered	
43	.....	12	13
44	.....	12	13
45	.....	396	396
46	.....	12	13
47	.....	12	13
48	.....	12	13
49	.....	12	13
50	.....	12	13
51	.....	619	619
52	.....	12	13
53	.....	12	13
54	.....	396	396
55	.....	12	13
56	.....	12	13
57	.....	896	897
58	.....	896	897
59	.....	396	396
60	.....	12	13
61	.....	Not Offered	
62	.....	147	147
63	.....	897	897
64	.....	155	156
65	.....	146	146
66	.....	232	232

Exhibit Number	Identified	Offered	Received or Rejected
67	.....	233, 479	479
68	.....	Not Offered	
69	.....	762	762
70	.....	155	156
71	.....	155	156
72	.....	762	762
73	.....	Not Offered	
74	.....	20, 155	20, 156
75	.....	762	762
76	.....	763	763
77	.....	763	763
78	.....	130	131
79	.....	12	13, 112
79	.....	12	13, 112, 229
79A	478	568	568, 762
80	.....	Not Offered	
81	.....	12	13
82	.....	12	13
83	.....	12	13
84	.....	12	13
85	.....	12	13
86	.....	12	13
87	.....	12	13
88	.....	12	13
89	.....	12, 57	57
90	.....	12	13
91	.....	12	13
91A	.....	57	57
92	.....	12	13
93	.....	12	13
94	.....	396	397
95	.....	196	200
96	.....	898	898 (Rejected)
97	.....	898	898 (Rejected)
98	.....	Not Offered	
99	.....	Not Offered	

Exhibit Number	Identified	Offered	Received or Rejected
100	.....	Not Offered	
101	.....	899	899
102	.....	899	899
103	.....	899	900 (Rejected)
104	.....	474	474
105	.....	1005	1005
106	.....	Not Offered	
107	.....	377	378 (Rejected)
108A	.....	202	202
108B	.....	202	202
109	.....	Not Offered	
110	.....	Not Offered	
111	.....	Not Offered	
112	.....	Not Offered	
113	.....	Not Offered	
114	.....	Not Offered	
115	.....	Not Offered	
116	.....	Not Offered	
117	.....	Not Offered	
118	.....	Not Offered	
119	.....	196	200
120	.....	389	484
121	.....	15	16
122	.....	15	16
123	.....	15	16
124	.....	901	901 (Rejected)
125	.....	35	37
126	.....	13	13
127	.....	13	13
128	.....	901	902 (Rejected)
129	.....	277	278
130	.....	902	903 (Rejected)
131	.....	13	15
132	211	903	903

Exhibit Number	Identified	Offered	Received or Rejected
133	413	466	467
133A	431	466	467
134	925	925	926
135	960	960	960
136	1095	1095	1096
137	1096	1096	1096
138	1121	1121	1121
139	CR 89-94	1145	1145